Supreme Court, U.S.
FILED

143

No. (1) 09-483 OCT 22 2009

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In The
Supreme Court of the United States

KONINKLIJKE BOSKALIS WESTMINSTER NV; BOSKALIS INTERNATIONAL BV; WESTMINSTER INTERNATIONAL BV,

Petitioners,

v.

In re: COMPANIA NAVIERA JOANNA SA, as Owner; MSC MEDITERRANEAN SHIPPING COMPANY SA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether any court may reject the Congressional requirement in the Limitation of Liability Act that once the injunction issues against other suits and the limitation fund is established, the court "shall" fully adjudicate the claims and distribute the limitation fund.

II. Whether dismissing a U.S. limitation proceeding on *forum non conveniens* grounds in favor of a foreign limitation action contradicts this Court's precedent in *The TITANIC* and impermissibly gives extraterritorial effect to a foreign limitation proceeding.

III. Whether the Fourth Circuit can substitute its "judicial efficiency" analysis for the requirements of this Court that the alternative forum be available before ordering a *forum non conveniens* dismissal.

PARTIES TO THE PROCEEDING

Koninklijke Boskalis Westminster NV, Westminster International BV and Boskalis International BV were claimants in the district court and appellants in the Court of Appeals for the Fourth Circuit.

MSC Mediterranean Shipping Company SA and Compania Naviera Joanna SA were petitioners in the district court and appellees in the Court of Appeals for the Fourth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, and to enable justices of the court to evaluate possible disqualification or recusal, petitioners - Koninklijke Boskalis Westminster NV, Westminster International BV and Boskalis International BV - certify that the following are all of the corporate parents and other publicly held companies owning 10% or more of any petitioner's stock:

HAL Holding NV

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 569 F.3d 189 (4th Cir. 2009). (*See* Appendix at 1a-44a). The unpublished order denying the petition for rehearing and for rehearing en banc is reproduced in the Appendix at 70a. The final judgment of the United States District Court for the District of South Carolina is reported at 531 F. Supp. 2d 680 (D.S.C. 2007). (46a-66a).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 26, 2009. (1a-44a). A timely petition for rehearing and rehearing en banc was denied on July 24, 2009. (70a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 30507 provides, in pertinent part:

> If the amounts determined . . . are insufficient to pay all claims –
>
> (1) all claimants shall be paid in proportion to their respective losses[1]

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[1] The full text of this provision is reproduced in the Appendix at 72a.

46 U.S.C. § 30511 provides, in pertinent part:

> (b) Creation of fund. When the action is brought, the owner . . . shall--
>
> (1) deposit with the court, for the benefit of claimants--
>
> (A) an amount equal to the value of the owner's interest in the vessel and pending freight, or approved security . . . .[2]

STATEMENT OF THE CASE

The courts below violated the Limitation of Liability Act and the *forum non conveniens* doctrine by allowing a plaintiff to use *forum non conveniens* to dismiss its own limitation action in favor of an unavailable foreign forum.

BACKGROUND

This litigation arose from a vessel collision in the Chinese Bohai Gulf between a containership owned and chartered by Swiss respondents, collectively referred to as "MSC," and the largest dredge in the world, owned and chartered by Dutch petitioners, collectively referred to as "Boskalis." The Chinese investigating agency found fault only on the MSC vessel.

MSC has sought to portray this as a domestic Chinese dispute, but it is not. MSC is one of the world's largest container shipping operations and

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[2] The full text of this provision is reproduced in the Appendix at 73a-74a.

admittedly has a considerable presence in the U.S., with significant activities in every major U.S. port. Boskalis is also a global company with worldwide operations. There were multinational crews on both vessels, as well as on a third vessel whose South African captain photographed the collision and is the key witness. Additionally, the determination of fault will be made pursuant to the COLREGS,[3] which are navigation rules used worldwide.

MSC was faced with multiple claims in the United States and China arising from the collision. Among these claims were maritime attachment actions initiated by Boskalis, pursuant to Supplemental Admiralty Rule B in United States district courts where MSC's property was found, to obtain security and recover over $326 million in damages resulting from the collision. Seeking to limit its liability for collision damages, MSC appropriately commenced two separate limitation of liability proceedings – one in the United States and one in China.

MSC filed its U.S. limitation proceeding on June 1, 2007 in the district court in Charleston, South Carolina, and placed over $111 million in security with the court to establish a limitation fund for the benefit of claimants, as required by the United States Limitation of Liability Act.[4] The jurisdiction of the district court was invoked under 28 U.S.C. § 1333, as this is a case of admiralty jurisdiction within the meaning of Federal Rule of

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[3] The Convention on the International Regulations for Preventing Collisions at Sea, 1972 ("COLREGS").

[4] 46 U.S.C. §§ 30501 *et seq.*

Civil Procedure 9(h). At MSC's request, the district court then issued an injunction restraining the commencement or further prosecution of claims against MSC relating to the collision, and requiring all parties to assert their claims against MSC in the limitation proceeding:

> NOW THEREFORE, on motion of . . . Plaintiff MSC Mediterranean Shipping Company SA and . . . Plaintiff Compania Naviera Joanna SA;
>
> IT IS ORDERED that a notice issue out of and under the seal of this Court admonishing all persons asserting claims for any and all losses, damages, injuries or destruction allegedly resulting from or incident to the occurrences and happenings recited in the Complaint to file their respective claims with the Clerk of this Court at Charleston, South Carolina, . . . or else be defaulted.
>
> . . . .
>
> IT IS FURTHER ORDERED that the commencement or further prosecution of any action or proceeding against the Plaintiffs, their underwriters or any of their property with respect to any claims for which the Plaintiffs seek limitation, including any claim arising out of or connected with any loss, damage, injury or destruction resulting from the casualty described in the

> Complaint, be and the same hereby are stayed and restrained until the hearing and determination of this proceeding.[5]

Pursuant to the district court's order, Boskalis' Rule B actions were stayed and Boskalis filed an answer and claim for damages in MSC's limitation of liability proceeding in Charleston. Once its claim and answer were filed, Boskalis was enjoined from asserting claims in any other forum.

On July 20, 2007, after requiring claimants to file in its Charleston proceeding, MSC moved to dismiss its own limitation of liability proceeding in favor of its Chinese limitation action on grounds of *forum non conveniens*. At the time MSC requested this dismissal, the June 30, 2007 deadline for filing claims in the Chinese limitation proceeding had passed. Despite the expiration of the Chinese statute of limitations, the district court granted MSC's motion on November 1, 2007, issuing an unconditional dismissal of MSC's limitation proceeding in favor of the Chinese forum. (46a-66a). Boskalis appealed. (75a).

On appeal, Boskalis asserted that, as a matter of law, a petitioner is not entitled to dismiss its own limitation of liability proceeding on *forum non conveniens* grounds. Boskalis also argued that the district court erred by creating and applying an exception to the well-settled law prohibiting a *forum non conveniens* dismissal without first finding that the proposed alternative forum was presently available and adequate, as set forth in this Court's

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[5] Appendix at 68a.

decisions in *Gulf Oil Corp. v. Gilbert*[6] and *Piper Aircraft Co. v. Reyno*.[7]

THE CIRCUIT COURT MAJORITY OPINION

A divided panel of the Fourth Circuit, over a vigorous dissent, affirmed the district court's dismissal. (1a-2a). After undertaking a historical analysis of the purposes behind the U.S. Limitation of Liability Act, the majority found that by using Admiralty Rule F in effect to consolidate claims and have them dismissed on *forum non conveniens* grounds, "MSC Shipping surely did not fulfill the full purpose of the Limitation of Liability Act, which includes the adjudication of claims against the fund." (18a). It also acknowledged MSC's "inconsistency of filing an action and then seeking its dismissal." (19a). Despite recognizing that MSC did not fulfill the full purpose of the Limitation Act, the majority concluded that MSC did not abuse the U.S. Limitation of Liability procedure because it properly created a limitation fund and because the limitation of liability action was "part of a larger related complex of actions filed in the United States." (21a). The court ultimately permitted MSC's course of action and ignored the express requirements of the Limitation Act in the interest of "judicial efficiency." (19a).

The Fourth Circuit next considered whether the district court erred by dismissing under the doctrine of *forum non conveniens* without first finding China to be an available forum. (24a-28a). Citing to this Court's decision in *Piper*,[8] the court

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[6] 330 U.S. 501 (1947).

[7] 454 U.S. 235 (1981).

[8] 454 U.S. 235, 254 n.22 (1981).

found that "[i]t is true that the doctrine of *forum non conveniens* can be applied only where another forum having jurisdiction is available at the time of the district court's decision to resolve the dispute." (25a). The court further stated that "if the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate." (25a). The court even acknowledged that "[t]he Chinese maritime court established a June 30, 2007, deadline for filing claims in the limitation action." (9a). Thus, on its face, the decision reflects that the statute of limitations for presenting Boskalis' claim in China had expired.

After acknowledging that the claims deadline in China had expired, the majority addressed evidence as to whether that deadline could be ignored by the parties or the Chinese court. The Fourth Circuit ultimately recognized that MSC had not carried its burden to show that China was an available forum, stating that "it is not clear whether a statute of limitations would have indeed barred Boskalis' claim against the limitation fund in China." (27a). The court, however, proceeded to hold that in this case the alternate forum need not be available. (27a-28a).

The majority wrongly approved of the district court's creation of an exception to this Court's requirement that the alternate forum be available for a *forum non conveniens* dismissal. (33a). It took the unwarranted position that because Boskalis was aware of the Chinese filing deadline but elected instead to proceed in the U.S. limitation action, it was permissible to dismiss the limitation regardless of whether China was currently available. (27a).

THE CIRCUIT COURT DISSENT

Judge Shedd correctly dissented from the majority's holding, which he described as conflicting with this Court's controlling law. (35a). First, he recognized that it is improper for a party to move to dismiss its own action on *forum non conveniens* grounds. (35a). "The burdens and presumptions that apply in a *forum non conveniens* analysis are based on the fact that the party who chose the current forum is not the one moving to dismiss the action." (36a). With the doctrine itself being designed for use by a defendant and with no authority establishing a party's right to dismiss its own action based upon the "inconveniences" of the forum it chose, Judge Shedd was "not convinced it was proper for MSC Shipping to move to dismiss its own action on *forum non conveniens* grounds." (36a).

Next, Judge Shedd challenged the majority's holding that MSC's conduct was consistent with the Limitation Act, stating that "[s]imply using the Act to obtain an injunction, however, does not make MSC Shipping's conduct consistent with the Act because MSC Shipping's conduct undercuts the more fundamental purpose of the Act, which is to allow a court to adjudicate claims against the full amount of the security posted." (37a). Judge Shedd found that "MSC Shipping has effectively used the Act to artificially limit a claimant's available recovery to less than 20 percent of the full fund." (*Id.*). And, after describing MSC's manipulation of the courts to dismiss its limitation proceeding after the expiration of the filing deadline in China, he concluded that "if the equities are at all relevant to determining whether MSC Shipping could move to dismiss its

own action on *forum non conveniens* grounds, they do not appear to favor MSC Shipping." (38a).

Judge Shedd then discussed the majority's abuse of discretion in dismissing without first finding that an alternative forum was available at the time of dismissal. (*Id.*). Judge Shedd analyzed this Court's precedent requiring that the moving party carry its burden to show an available forum, and found that "the majority does not require MSC Shipping to meet its burden." (40a). Then, after highlighting the "vital purpose" served by the availability requirement, Judge Shedd disagreed with the majority's adoption of an exception to that requirement, finding that "The majority's decision thus represents a dramatic change from current law." (*Id.*).

In addition to disagreeing with the use of any exception to the availability requirement, Judge Shedd further criticized the majority's "bad faith" exception as not being applicable on the facts of this case, even if such an exception did exist. (41a-42a). Finding nothing inappropriate or even unusual about Boskalis' actions, and noting that neither the district court nor the Fourth Circuit found any bad faith on the part of Boskalis, the dissent determined that if there were an exception, it would not apply in this case: "Both United States and Chinese law provided Boskalis with options for attempting to recover losses associated with the collision, and Bosklais simply elected not to pursue a remedy in China. Similar decisions are made by litigants all the time when they decide whether and where to commence an action, and this alone does not show any bad faith by Boskalis." (42a).

Judge Shedd finished his criticism of the majority's exception to the availability requirement by analyzing and distinguishing the cases relied upon by the majority. (42a-43a). The authorities cited by the majority "all involve cases where courts have held or suggested that the past conduct of the party who *commenced* the action can be held against it in determining whether an alternative forum is available." (*Id.*). Consequently, Judge Shedd found that "these three cases do not support considering Boskalis' conduct as a factor in deciding the *forum non convenience* issue because Boskalis did not commence this action. It merely responded to a complaint filed by MSC Shipping in a forum of MSC Shipping's choosing." (43a).

REASONS FOR GRANTING THE PETITION

I. A court cannot reject the Congressional requirement in the Limitation of Liability Act that once the injunction issues against other suits and the limitation fund is established, the court "shall" fully adjudicate the claims and distribute the limitation fund.

A. Congress requires, through the Limitation Act, that a court fully adjudicate all claims and distribute the limitation fund amongst claimants.

This case represents the first time a U.S. court has ever dismissed a limitation of liability proceeding applying the U.S. Limitation of Liability Act[9] on

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[9] 46 U.S.C. §§ 30501 *et seq.*

forum non conveniens grounds. Such a dismissal conflicts with the express provisions of the Limitation Act by allowing a limitation petitioner to marshal claimants and enjoin other actions, only to then dismiss the limitation action without fulfilling the Act's legitimate requirements by adjudicating claims and distributing the fund. The Limitation Act requires the petitioner to distribute the limitation fund, emphasizing that the fund is for the claimants' benefit:

> (b) Creation of fund. When the action is brought, the owner... ***shall***--
>
> (1) deposit with the court, ***for the benefit of claimants***--
>
> (A) an amount equal to the value of the owner's interest in the vessel and pending freight, or approved security; . . .[10]

The Act also requires that "all claimants ***shall be paid*** in proportion to their respective losses."[11] In *Lake Tankers v. Henn*, the Court quoted this section's predecessor, 46 App. U.S.C. § 184, as authority that the only basis for requiring claimants to appear in a single forum was to pay them from the fund:

> they shall receive compensation from the owner of the vessel in proportion to their respective losses; and ***for that***

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[10] 46 U.S.C. § 30511(b) (emphasis added), reproduced in the Appendix at 73a-74a.

[11] 46 U.S.C. § 30507 (emphasis added), reproduced in the Appendix at 72a.

> ***purpose*** . . . [the owners] . . . may take the appropriate proceedings in any court[12]

Once MSC created the limitation fund, the Limitation Act itself dictated that its purpose was to benefit claimants, not to facilitate sending them to an unavailable and inadequate forum. Because the text of the Limitation Act is not ambiguous, courts "must apply the statute according to its terms."[13] The Act's use of the word "shall" is a mandatory Congressional command that is not subject to judicial discretion.[14] Dismissing the limitation proceeding directly contradicts this statutory mandate because it deprives the claimants of the limitation fund.

As previously stated by the Fourth Circuit, "The right of the vessel owner to limit liability is wholly statutory in the United States ... To avail

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[12] 354 U.S. at 151. (emphasis in original).

[13] *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (U.S. 2009); *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

[14] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007)(citing *Lopez v. Davis*, 531 U.S. 230 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Association of Civil Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); BLACK'S LAW DICTIONARY 1375 (6th ed. 1990)).

himself of this right granted by the statute the owner must bring himself within the terms fixed by the statute."[15] These statutory provisions should be liberally construed, but "liberality of construction cannot be extended so that express conditions laid down are waived or ignored."[16]

Accordingly, once a petitioner invokes the benefits of U.S. law and the power of U.S. courts to consolidate claims in the forum of its choosing and to prevent any claims outside of that forum, the petitioner must comply with the remaining provisions of the same statute, including determining liability and distributing the fund among claimants. It may not, the instant U.S. law ceases to be of use to it, "abandon its limitation proceeding . . . and quietly float away."[17]

B. This Court's precedents prohibit using the Limitation Act solely as a means to consolidate claims.

Once an answer and claim are filed in the limitation proceeding, the court obtains jurisdiction over the limitation fund, and is bound to use it to provide claimants a complete remedy.[18] In *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*,[19]

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[15] *Standard Wholesale Phosphate & Acid Works, Inc. v. Travelers Ins. Co.*, 107 F.2d 373, 376 (4th Cir. 1939).

[16] *Id.*

[17] *Karim v. Finch Shipping Co.*, 265 F.3d 258, 266 (5th Cir. 2001).

[18] *See Just v. Chambers*, 312 U.S. 383, 386-87 (1941); *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 217 (1927).

[19] 273 U.S. 207, 217 (1927).

this Court considered what must be done with the limitation fund if the owner cannot limit its liability.[20] There, the owner argued that the claimants must seek recovery elsewhere, not from the limitation fund.[21] Chief Justice Taft held that it would be inequitable for valid claimants to have no recovery after being brought into a limitation proceeding against their will and prevented from establishing claims in other courts.[22]

Later, in *Just v. Chambers*,[23] Chief Justice Hughes recognized that one of the purposes of the Limitation Act was "to afford an opportunity for the determination of claims against the vessel and its owner."[24] Citing *Hartford*, the Court reiterated that an admiralty court has jurisdiction to fulfill the obligation to claimants by furnishing a complete remedy.[25]

The Fourth Circuit found that "MSC Shipping commenced this action to enjoin all of Boskalis' actions in favor of one action and then to have it dismissed under the doctrine of *forum non conveniens*."[26] The court then explicitly recognized that this was not consistent with the intended

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[20] *Id.* at 213.

[21] *Id.* at 216.

[22] *Id.* at 217.

[23] 312 U.S. 383, 386-87 (1941).

[24] *Id.* at 385-86 (citing *Norwich & N. Y. Transp. Co. v. Wright*, 80 U.S. 104, 121 (1872)).

[25] *Id.* at 386-87.

[26] *In re Compania Naviera Joanna SA*, 569 F.3d 189, 196 (4th Cir. 2009), Appendix at 13a-14a.

purposes of the Act, stating, "MSC Shipping surely did not fulfill the full purpose of the Limitation of Liability Act, which includes the adjudication of claims against the fund."[27]

As the Fourth Circuit recognized, a limitation of liability proceeding is analogous to an interpleader action or bankruptcy proceeding in that the court is authorized to enjoin all prosecution of claims regarding the matter other than against the fund.[28] Once claimants have been marshaled in those actions, a petitioner is not entitled to dismiss the action and remove the very fund that provided the basis for gathering claimants. The petitioner in those situations is not entitled to dismiss the action in favor of a foreign jurisdiction that is unavailable. The result should be no different in an analogous limitation of liability.

This Court's precedents prohibit shipowners from using the Act's injunctive powers simply to avoid multiple lawsuits. In *Lake Tankers v. Henn*,[29] this Court mandated that unless the shipowner is going to distribute a limited fund among claimants, the Limitation Act cannot be used to avoid multiple lawsuits that any other defendant must face:

> It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad

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[27] *Id.*, Appendix at 18a.

[28] *Id.*; Appendix at 17a.

[29] 354 U.S. 147 (1957).

> company. . . . They, too, must suffer a multiplicity of lawsuits.[30]

While rejecting use of the concursus when no fund will be distributed, the *Lake Tankers* Court explained that the concursus itself is not a valid reason for invoking the Act; rather it is merely a method for achieving the Act's "primary purpose of apportioning the limitation fund among claimants."[31] Allowing MSC to marshal claimants and then dismiss the limitation action without distributing the limitation fund advances no legitimate purpose, and would impermissibly "transform the Act from a protective instrument to an offensive weapon."[32] As the Court noted:

> The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability.[33]

The Fourth Circuit's decision to permit MSC to enjoin Boskalis' actions in favor of one action,

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[30] *Id.* at 153; *See also Petition of Texas Co.*, 213 F.2d 479, 482 (2d Cir. 1954).

[31] *Id.* at 152-53; *See also Petition of Texas*, 213 F.2d at 482 ("The 'purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets -- the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full.'").

[32] *Lake Tankers*, 354 U.S. at 152.

[33] *Id.*

solely to be dismissed under *forum non conveniens*, contradicts this Court's precedent and the Limitation Act's plain language and must not be allowed.

If the Fourth Circuit is not reversed, shipowners will be able to use the Limitation Act as a means to consolidate claims only for dismissal, and not for fulfilling the Act's legitimate purposes of adjudicating liability and distributing the limitation fund among claimants, as required by this Court in *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*,[34] *Just v. Chambers*,[35] and *Lake Tankers v. Henn*.[36]

C. No authorities support the Fourth Circuit's punitive *forum non conveniens* dismissal.

Because of the well established principles described above, no court has ever dismissed a limitation proceeding applying U.S. limitation law on grounds of *forum non conveniens*. Nor does any case support such a dismissal.

The Fourth Circuit erroneously interpreted several aspects of *MS BREMEN v. Zapata Off-shore Co.*[37] as permitting a petitioner to dismiss its own limitation proceeding for *forum non conveniens*.[38]

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[34] 273 U.S. 207 (1927).

[35] 312 U.S. 383 (1941).

[36] 354 U.S. 147 (1957).

[37] 407 U.S. 1 (1972).

[38] *In re Compania Naviera Joanna SA*, 569 F.3d 189, 199 (4th Cir. 2009); Appendix at 12a and 19a.

First, *BREMEN* does not support dismissing a limitation proceeding after claimants have been marshaled and claims and answers filed. In *BREMEN*, the defendant vessel owner moved to dismiss a breach of towage contract action to enforce a forum selection clause, or alternatively for *forum non conveniens*.[39] The motion was filed and argued in the underlying litigation, months before the limitation proceeding was commenced.[40] The court had yet to rule on the motion to dismiss as the six-month time limit for filing a limitation of liability action approached, so the vessel owner filed its limitation petition.[41]

Both the district court and the Fifth Circuit declined to dismiss the case for *forum non conveniens* or to enforce the forum selection clause in the towage contract. This Court vacated those decisions and directed that the contractual forum selection clause should be enforced.[42] But it found that "absent a contracted forum" the district court's decision not to dismiss would have been appropriate.[43] Thus, it was the existence of a contractual forum selection clause, not a *forum non conveniens* determination that led to the dismissal in *BREMEN*.

Second, *BREMEN* does not support the Fourth Circuit's suggestion that MSC was compelled to file for limitation in response to Boskalis' Rule B

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[39] *BREMEN*, 407 U.S. at 3-4.

[40] *Id.*

[41] *Id.* at 5.

[42] *Id.* at 15.

[43] *Id.* at 9.

attachment actions. The only reason the *BREMEN* court labeled the vessel owner's limitation action as defensive was because it was initiated solely in response to the impending expiration of the six-month statutory period for filing limitation actions. This is far from the current situation, where MSC had no pending motions in any underlying suit and filed its limitation complaint more than four months before the six-month statutory filing deadline.[44]

The Fifth Circuit properly recognized the voluntary nature of a limitation proceeding when it stated that a shipowner "is not 'required' to take advantage of defenses offered under federal statutes; its action is voluntary in that it made a strategic choice to avail itself of a United States statutory defense to limit its liability."[45] And "[b]y invoking the statutory opportunity to limit its liability, the shipowner consents to the jurisdiction of the federal district court."[46]

MSC did not bring *forum non conveniens* motions in the underlying lawsuits, as was done in *BREMEN*. MSC was not forced into commencing its limitation proceeding by a statutory filing deadline, as in *BREMEN*. And MSC did not voluntarily contract for a forum selection clause prescribing where the suit should be heard, as in *BREMEN*. Rather, MSC's decision to initiate a limitation action

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[44] On May 4, 2007, Boskalis filed its first attachment lawsuit. MSC filed for limitation of liability on June 1, 2007, within one month of Boskalis' suit.

[45] *Karim v. Finch Shipping Co. Ltd.*, 265 F.3d 258, 266 n.10 (5th Cir. 2001).

[46] *Id.* at 265.

in Charleston was a voluntary choice to conveniently and offensively take advantage of U.S. statutory laws to prohibit claims from being filed against it and to dictate the forum for litigation. Consequently, *BREMEN* is inapposite and has no bearing on the instant case.

The Fourth Circuit's reliance on this Court's decision in *Sinochem Int'l Co., Ltd v. Malaysia Int'l Shipping Corp.*[47] is equally erroneous. In *Sinochem*, this Court found it permissible to dismiss on *forum non conveniens* grounds prior to affirmatively determining difficult jurisdictional questions, if considerations of convenience, fairness and judicial economy so warranted.[48] Thus the Court affirmed dismissal in favor of a Chinese admiralty court which, in that particular case, was deemed available, adequate and significantly more convenient.

Sinochem, however, did not involve any of the issues that prohibit dismissal in this case. It was not a limitation of liability action, nor was there any statute of limitations rendering the Chinese forum unavailable.[49] Consequently, *Sinochem* does not address the questions presented here and provides no support for MSC dismissing its own limitation action.

The district court's reliance on *In re Geophysical Service, Inc.*[50] is also misplaced. There, the district court found that Canadian limitation law

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[47] 549 U.S. 422 (2007).

[48] *Id.*

[49] *Id.*

[50] 590 F. Supp. 1346 (S.D. Tex. 1984).

applied in the U.S. proceeding, and under Canadian law, a time charterer was entitled to limit its liability.[51] The court then found that because Canadian limitation law applied, the Canadian court would be the best forum for resolving the dispute. Because the U.S. Limitation of Liability Act will be applied here rather than the Canadian Shipping Act or Chinese limitation law, *In re Geophysical* does not support dismissing MSC's U.S. limitation action.

D. It is contrary to all reason to allow a petitioner to dismiss its own action based upon the convenience of the forum in which it filed.

Forum non conveniens dismissal of a limitation action in which US limitation law applies is simply illogical and inappropriate. MSC abused the Limitation Act and the federal court system by holding out a fund of over $111 million as a benefit for claimants, then withdrawing that fund and dismissing its own action in favor of a Chinese forum that is not available and offers no meaningful remedy for the loss exceeding $326 million caused solely by the MSC JOANNA. MSC's procedural manipulation of the limitation injunction to require claimants to file in a particular forum is inconsistent with the later invocation of *forum non conveniens*. How could the forum it chose, and in which it obtained an injunction against claims in other jurisdictions, be inconvenient?

Forum non conveniens is a doctrine of federal common law that was developed to address the problem of a party commencing an action in an

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[51] *Id.* at 1357.

inconvenient forum to "'vex,' 'harass,' or 'oppress' the defendant."[52] The *forum non conveniens* analysis has developed over time into a balancing test that includes a well-recognized set of prerequisites, burdens and interest factors.[53] Not surprisingly, this analysis presumes that the party who chose the current forum is not the one moving to dismiss the action.[54] Indeed, the forum chosen by the party commencing an action is presumed to be convenient, and the *forum non conveniens* doctrine provides a method for the opposing party to challenge a forum it did not choose.[55] Application of the doctrine is simply not intended or appropriate for use by the party that chose the forum and affirmatively required other parties to bring their claims to that forum.

The majority's endorsement of MSC's strategy contravenes the basic purposes and rationale for both the Limitation Act and the doctrine of *forum non conveniens*. It vastly expands the *forum non conveniens* doctrine from a defense against vexatious behavior into a means by which a shipowner may avoid liability for a collision. Such a misuse of the *forum non conveniens* doctrine violates established

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[52] *Gilbert*, 330 U.S. at 508.

[53] *See Piper*, 454 U.S. at 235.

[54] *See Gilbert*, 330 U.S. at 507-09; *Piper*, 454 U.S. 235; *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)(all discussing the presumptions and burdens of the *forum non conveniens* analysis in terms of the defendant challenging the plaintiff's choice of forum).

[55] *Piper*, 454 U.S. at 265; *In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting) (citing *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)); Appendix at 36a.

law and encourages other shipowners to engage in similar abusive tactics.

Modern maritime commerce is a worldwide business with most vessels having foreign home ports, foreign owners, foreign operators, foreign ports of call and myriad other foreign interests. There will often be a forum that is arguably more convenient than where the limitation proceeding was instituted. However, a universal tenet of maritime law is that a shipowner engaged in international commerce must face lawsuits in any forum where its vessels are found. This is particularly true after depositing security with the court and requiring all claimants to proceed in that forum. After that, MSC should have no further ability to withdraw the fund or manipulate its use. The court has a duty to process the limitation proceeding and provide a complete remedy to the claimants responding to the requested monition.

Judge Shedd explained the reasons why the court should not have relinquished jurisdiction: "The Supreme Court has repeatedly instructed that 'federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.'"[56] The *forum non conveniens* doctrine represents a narrow exception to the "virtually unflagging obligation" of federal courts to exercise their jurisdiction.[57] The majority's endorsement of MSC's actions vastly expands the scope and

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[56] *In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting) (*citing Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)); Appendix at 41a.

[57] *Id.*

applicability of this "narrow" doctrine. Such an unprecedented expansion of the *forum non conveniens* doctrine is inappropriate and should be reversed.

II. Dismissing MSC's limitation action improperly gave extraterritorial effect to MSC's Chinese limitation proceeding.

In *The TITANIC*, this Court established that limitation of liability proceedings have no extraterritorial effect.[58] When MSC or any other shipowner commences limitation proceedings in multiple forums, claimants may choose the forum in which to file their claims. Dismissing MSC's U.S. limitation proceeding on *forum non conveniens* grounds contradicts *The TITANIC* and impermissibly gives extraterritorial effect to MSC's Chinese limitation proceeding.

In March 2007, MSC commenced a limitation of liability proceeding in China under Chinese procedural law. In June 2007, MSC took advantage of the benefits and protections of U.S. law by commencing its U.S. limitation proceeding and giving public notice to claimants. From June 1 to June 30, 2007, both of MSC's actions were simultaneously open and accepting claims. MSC's dual limitation proceedings gave claimants the option of filing in either the U.S. proceeding or the Chinese proceeding.

It is settled law that limitation proceedings have no extraterritorial effect, and are not given

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[58] *Ocean Steam Nav. Co. v. Mellor (THE TITANIC)*, 233 U.S. 718 (1914).

international recognition.[59] That allows claimants to pursue actions against the offending shipowner in any tribunal where jurisdiction can be obtained.[60] Accordingly, a shipowner may benefit from filing limitation actions in more than one forum.[61]

In one of the most famous maritime disasters in history, the TITANIC struck an iceberg and sank in the North Atlantic with only a few lifeboats surviving the incident.[62] In subsequent litigation, the English vessel owners commenced limitation proceedings in both England and the U.S. An English claimant objected to being bound by the U.S. limitation proceeding, where the limitation fund, based on the post-incident value of the vessel, was negligible.[63] Justice Holmes established the purely domestic effect of the U.S. limitation proceeding, and refused to allow the owners to force claimants in the English proceeding to file claims in the U.S. proceeding:

> The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in, and

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[59] *See The TITANIC*, 233 U.S. at 732; *British Transport Commission v. United States*, 354 U.S. 129, 142 (1957) (no compulsion can be exerted on foreign claimants to file claims); *In re Bowoon Sangsa Co. Ltd. v. Micronesian Indus. Corp.*, 720 F.2d 595, 599 (9th Cir. 1983); *In re Bloomfield S.S. Co.*, 422 F.2d 728, 736 (2d Cir. 1970).

[60] *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980); *In re Bloomfield S.S. Co.*, 422 F.2d at 736.

[61] *See In re Bethlehem Steel Corp.*, 631 F.2d 44.

[62] *The TITANIC*, 233 U.S. at 730.

[63] *Id.* at 732.

> can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear.
>
> . . . .
>
> We see no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case.[64]

Thus *The TITANIC* prohibits the exact procedural manipulation that the Fourth Circuit permitted here. Petitioners may not commence multiple limitation actions and then force claimants into the proceeding providing the least recovery.

Just like in *The TITANIC* where this Court would not allow a U.S. limitation proceeding to trump a foreign action, a foreign limitation action should not be permitted to supersede MSC's U.S. proceeding. The existence of a foreign limitation proceeding simply cannot require a U.S. court to relinquish its jurisdiction.[65] Based on this principle, shipowners engaged in international trade should expect to be involved in legal proceedings in more than one country.[66] Granting MSC's motion impermissibly gives extraterritorial effect to the

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[64] *Id.* at 732-34.

[65] *The WESTERN FARMER*, 210 F.2d 754, 757 (2d Cir. 1954) (Hand, J., citing *The TITANIC*).

[66] *See In re Bloomfield S.S. Co.*, 422 F.2d at 736.

Chinese limitation proceeding by effectively holding that the Chinese limitation supersedes the U.S. limitation. The ultimate effect is to deprive Boskalis of any forum in which to recover damages caused by MSC.

III. The Fourth Circuit cannot substitute its judicial efficiency analysis for the requirements of this Court that the alternative forum be available before ordering a *forum non conveniens* dismissal.

Another reason for issuing a writ of certiorari is to determine whether the Fourth Circuit's decision to ignore the *forum non conveniens* doctrine's availability requirement, established in *Gulf Oil Corp. v. Gilbert*[67] and *Piper Aircraft Co. v. Reyno*,[68] should be overruled as an improper expansion of the doctrine's application. It is impermissible for a court to disregard the basic underpinning of the *forum non conveniens* doctrine and dismiss a case with no available alternate forum solely in the interest of "judicial efficiency." As Judge Shedd states:

> The majority's decision thus represents a dramatic change from current law.[69]

In *Piper*[70] and *Gilbert*,[71] this Court explained that finding an available and adequate alternative

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[67] 330 U.S. 501 (1947).

[68] 454 U.S. 235 (1981).

[69] *In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting); Appendix at 40a.

[70] 454 U.S. 235 (1981).

[71] 330 U.S. 501 (1947).

forum is a prerequisite to granting a *forum non conveniens* dismissal. In *Gilbert*, this Court unequivocally stated that the doctrine of *forum non conveniens* "presupposes at least two forums" and "furnishes the criteria for choice between them."[72] Because of this supposition, the Court developed a *forum non conveniens* analysis that requires, as a mandatory prerequisite to dismissal, a determination that an alternative forum exists that is both adequate and available.[73]

This availability requirement furthers the legitimate purposes of *forum non conveniens*. The doctrine of *forum non conveniens* is not intended to act as an outright dismissal, depriving the plaintiff of its day in court. Rather, its purpose is to prevent a plaintiff from selecting an excessively inconvenient forum to vex, harass or oppress the defendant.[74] If the court determines that application of the doctrine is appropriate in a particular case, the effect is to allow the case to be brought in an available forum that is more convenient for its litigation. This availability requirement helps to ensure that a tribunal in some alternative forum will address the merits of the dispute.[75] If there is not a significantly more convenient alternative forum available to the

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[72] *Id.* at 506-07.

[73] *Id.*

[74] *Gilbert*, 330 U.S. at 508; *In re Compania Naviera Joanna SA*, 569 F.3d at 210 n.3 (Shedd, J., dissenting); Appendix at 42a.

[75] *In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting); Appendix at 40a-42a.

plaintiff, then a *forum non conveniens* dismissal should be denied.[76]

Every circuit court of appeals to address the issue has interpreted the availability requirement as precluding dismissal if the statute of limitations in the alternate forum would bar the claim.[77] The Fourth Circuit expressly recognized this rule, stating that "if the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate.[78] It has also acknowledged that the plaintiff has the burden of showing that there is no statute of limitations that renders the alternative forum unavailable.[79]

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[76] *Id.* (citing *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 (5th Cir. 1983)("if no other forum is available...it would be exceedingly harsh to dismiss for forum non conveniens.")); Appendix at 41a.

[77] *DeShazo v. Nations Energy Co.*, 286 Fed. Appx. 110, 112 (5th Cir. 2008)(finding that defendant had failed to show that another forum was available, because the statute of limitations in the foreign court barred the suit); *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001)("an adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum"); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 n.8 (1st Cir. 1991)(available alternative forum not established because defendant had not carried its burden to show that the statute of limitations would not bar the claim in the foreign forum); *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 316 (4th Cir. 1984)("[defendant] has not met its heavy burden of showing for each individual action that no statute of limitations in the plaintiff's home state renders that state ineligible to serve as an alternative forum.").

[78] *In re Compania Naviera Joanna SA*, 569 F.3d at 202 (citing *Kontoulas*, 745 F.2d at 316); Appendix at 25a.

[79] *Kontoulas*, 745 F.2d at 316.

After explicitly recognizing this binding precedent, the majority affirmed dismissal despite specifically acknowledging that MSC had not carried its burden.[80] The majority found that the Chinese statute of limitations had expired on June 30, 2007,[81] and held that it was "not clear" whether the statute of limitations would bar Boskalis' claims.[82] Clearly MSC had not carried its "heavy burden" to show that China was available.

The Fourth Circuit in this case ignored the clear precedent from this Court's decisions in *Gilbert* and *Piper* requiring a finding that the alternative forum is available at the time of dismissal. Because it directly conflicts with the *forum non conveniens* availability requirement set forth by this Court, "[t]he majority's decision . . . represents a dramatic change from current law."[83] Consequently, certiorari is necessary to secure and maintain uniformity in the application of this Court's decisions.

A. *Forum non conveniens*' mandatory availability requirement leaves no room for an exception.

The majority's attempt to create an exception to the availability requirement further conflicts with

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[80] *In re Compania Naviera Joanna SA*, 569 F.3d at 202 ("it is thus not clear whether a statute of limitations would have indeed barred Boskalis' claim against the limitation fund in China"); Appendix at 27a.

[81] *Id.* at 195 ("The Chinese maritime court established a June 30, 2007, deadline for filing claims in the limitation action."); Appendix at 9a.

[82] *In re Compania Naviera Joanna SA*, 569 F.3d 189, 196 (4th Cir. 2009), Appendix at 27a.

[83] *Id.* at 209 (Shedd, J., dissenting); Appendix at 40a.

this Court's precedent and justifies certiorari. The well-defined *forum non conveniens* analysis leaves no room for an exception to the availability requirement. *Gilbert* clearly requires at least two alternative forums in which claims may be pursued. As the Court explained, *forum non conveniens* is a doctrine that weighs and balances the relative convenience of alternative forums for litigating a particular dispute.[84] *Forum non conveniens* is simply illogical if the claim is only viable in one forum.

A careful analysis of the *Gilbert* decision reveals that consideration of a plaintiff's reasons for choosing a particular forum in which to bring its claim is appropriate when weighing the balance of convenience between two forums.[85] This exception is not, however, a factor to be considered by the court in determining whether to initially consider *forum non conveniens*. The Court clearly separated the availability requirement from the factors to consider when balancing two competing forums. It even placed them in separate numbered sections of the decision.[86]

Section I of the Court's opinion discusses the type of cases in which a court may consider using the doctrine of *forum non conveniens* as a tool to transfer a case to an alternate forum.[87] In this section, the Court requires the existence of two available forums as a prerequisite to even considering *forum non*

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[84] *Gilbert*, 330 U.S. at 506-07.

[85] *Id.* at 507-08.

[86] *Id.* at 504-08.

[87] *Id.* at 504.

conveniens.[88] Then, once satisfied that two available forums exist, Section II of the opinion details the doctrine itself and the factors a court may consider when balancing the relative conveniences of the two forums. It is this section that contains the discussion about the weight to give to the plaintiff's initial forum selection, and the Court allows the plaintiff's motive for choosing the forum to be considered if an inconvenient forum was deliberately chosen to vex, harass or oppress the defendant.[89] Thus, while the plaintiff's motive in choosing a forum may be considered when weighing the *forum non conveniens* factors, it cannot be considered until it is determined that the prerequisites for applying the doctrine are satisfied.

The Fourth Circuit's exception, if permitted by this Court, would set dangerous precedent for future cases by expanding the applicability of the *forum non conveniens* doctrine to the point where a case can be dismissed if there ever was an alternative forum and if the party opposing dismissal was aware that it had been available. In this case, for example, the Fourth Circuit found that Boskalis was aware of the deadline for filing claims in China but did not present a claim.[90] This fact alone was enough for the Fourth Circuit to disregard this Court's mandate that the alternate forum be available, and was the basis for its punitive dismissal.[91]

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[88] *Id.* at 506.

[89] *Id.* at 507-08.

[90] *In re Compania Naviera Joanna SA*, 569 F.3d at 202-03, Appendix at 7a.

[91] The majority did not call its exception one for "bad faith" and did not find that Boskalis was in bad faith.

The Fourth Circuit failed to acknowledge that because Boskalis presented a claim in MSC's U.S. limitation proceeding, it was prohibited by the district court's own limitation injunction from filing a claim against MSC in any other forum.[92] This injunction, issued at the request of MSC, required that all claimants cease prosecution of other actions against MSC.[93]

As clearly explained in the dissent, when MSC presented Boskalis with the option of filing its claim in the U.S. or Chinese limitation actions, which were simultaneously accepting claims, Boskalis chose to proceed in the United States.[94] As further recognized in the dissent, litigants make similar decisions all the time when deciding whether and where to commence an action – particularly in the truly international field of maritime commerce.[95]

Now, a party may avoid all liability for a claim simply by waiting for the statute of limitations to run in a forum in which the claim might have initially been filed, and then seeking a *forum non conveniens* dismissal in favor of that now unavailable forum. As long as the opposing party was aware of the foreign statute of limitations, the Fourth Circuit would grant the dismissal, effectively denying the plaintiff access to any forum. Such an exception is unprecedented and contrary to the express and intended purposes of *forum non*

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92 *See* Limitation Injunction, Appendix at 67a-69a.

93 *Id.*

94 *In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting).; Appendix at 41a-42a.

95 *Id.*

conveniens as set forth by this Court in *Gilbert*[96] and *Piper*.[97]

B. The cases cited by the Fourth Circuit do not support its exception.

In developing their exception to the availability requirement, the courts below relied exclusively on three cases that do not support their position.

The Fourth Circuit's reliance on *Castillo v. The Shipping Corp. of India*,[98] is erroneous and directly contrary to *Castillo*'s holding because Boskalis filed its claim in the U.S. within the time limitation prescribed in the Chinese litigation. The *Castillo* court justified a *forum non conveniens* dismissal by the fact that the plaintiff in that case let the statute of limitations in the alternate forum prescribe ***before*** filing suit in the U.S.[99] The court went on to find that if the plaintiff had filed within the time limitations imposed by the alternate forum, dismissal would not be appropriate if the statute of limitations would bar the claim.[100] Because Boskalis clearly brought its claim in the U.S. within the time limitations imposed by China, *Castillo* is distinguishable and, on its own terms, does not support the court's exception.

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[96] 330 U.S. 501 (1947).

[97] 454 U.S. 235 (1981).

[98] 606 F. Supp. 497 (S.D.N.Y. 1985).

[99] *Castillo*, 606 F. Supp. at 504.

[100] *Id.*

In contrast, the holding of *In re Air Crash Disaster Near Bombay*,[101] cited by the *Castillo* court, applies here. In that case, plaintiffs had commenced suit in the U.S. within the time limitations imposed by the foreign forum. By the time the U.S. court decided the *forum non conveniens* issue, the foreign forum's statute of limitations had run. Consequently, the court declined to dismiss the action because the plaintiffs no longer had an available alternative forum for their claims.[102] The court in this case should have reached the same result.

Additionally, *In re Bridgestone/Firestone, Inc.*[103] and *Veba-Chemie A.G. v. M/V Getafix* provide no support for the Fourth Circuit's exception to the availability requirement.[104] The Fourth Circuit grasped at dictum in a *Veba-Chemie* footnote discussing the potential for a court to disregard the lack of availability of the alternate forum if the plaintiff's motive for choosing his forum was to vex, harass, or oppress the defendant.[105] And it cited *In re Bridgestone/Firestone, Inc.*'s admonition against a party's manipulation of foreign courts to make a forum unavailable through fraud or bad faith.[106]

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[101] 531 F. Supp. 1175 (W.D. Wash. 1982).

[102] *Air Crash Disaster Near Bombay*, 531 F. Supp. at 1181-82.

[103] *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 706-07 (7th Cir. 2005).

[104] *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n. 10 (5th Cir. 1983).

[105] *In re Compania Naviera Joanna SA*, 569 F.3d at 203; Appendix at 28a.

[106] *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 706-07 (7th Cir. 2005).

Even if those decisions were correct, they would not support application of an exception here because neither the Fourth Circuit nor the district court found that Boskalis' actions were undertaken in bad faith or were designed to vex, harass, or oppress MSC.

By commencing two concurrent limitation proceedings, MSC provided Boskalis with an choice of forums in which to bring its claim. One was in China and afforded Boskalis essentially no possibility of recovery.[107] The other was in the U.S. and provided Boskalis with over $111 million in recovery. When presented with these choices, it was not fraudulent or in bad faith to file a claim in the forum that provided some chance of recovery for their significant damages and to not file a claim in the forum that provided no chance for recovery.[108]

Consequently, the authorities cited by the Fourth Circuit do not support its exception to the availability requirement or its application in this case.

CONCLUSION

Certiorari should be granted because order and uniformity can be restored to the doctrine of *forum non conveniens* only if the Fourth Circuit is reversed and it is held that:

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[107] Due to Chinese rules regarding priority of claims in a limitation proceeding, Boskalis' claim would have been subordinate to another claim in the Chinese proceeding. The claim with priority exceeded the amount of the limitation fund, so Boskalis would have been left with no recovery.

[108] *See In re Compania Naviera Joanna SA*, 569 F.3d at 209 (Shedd, J., dissenting); Appendix at 41a-42a.

- A plaintiff cannot dismiss its own action on *forum non conveniens* grounds;

- A limitation action cannot be dismissed after the fund is established and an answer is filed, but before limitation is decided and the fund is distributed; and

- An action cannot be dismissed on *forum non conveniens* grounds unless there is an available alternative forum.

Thus, Boskalis respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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[ENTERED: June 26, 2009]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: COMPANIA NAVIERA JOANNA SA, as OWNER; MSC MEDITERRANEAN SHIPPING COMPANY SA,

Appellees,

v. No. 08-1031

KONINKLIJKE BOSKALIS WESTMINSTER NV; BOSKALIS INTERNATIONAL BV; WESTMINSTER INTERNATIONAL BV,

Claimants-Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:07-cv-01531)

Argued: March 24, 2009

Decided: June 26, 2009

Before NIEMEYER and SHEDD, Circuit Judges, and Thomas D. SCHROEDER, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed as modified by published opinion. Judge Niemeyer wrote the opinion, in which Judge

Schroeder joined. Judge Shedd wrote a dissenting opinion.

COUNSEL

ARGUED: Mary Campbell Broughton, FOWLER RODRIGUEZ VALDES-FAULI, Mobile, Alabama, for Appellants. Gordon D. Schreck, BUIST, MOORE, SMYTHE, MCGEE, PA, Charleston, South Carolina; Douglas M. Muller, MOORE & VAN ALLEN, PLLC, Charleston, South Carolina, for Appellees. **ON BRIEF:** Antonio J. Rodriguez, Alanson T. Chenault, IV, FOWLER & RODRIGUEZ, New Orleans, Louisiana; Paul F. Tecklenburg, TECKLENBURG LAW FIRM, LLC, Charleston, South Carolina, for Appellants. Adriane M. Belton, BUIST, MOORE, SMYTHE, MCGEE, PA, Charleston, South Carolina, for Appellee MSC Mediterranean Shipping Company SA.

OPINION

NIEMEYER, Circuit Judge:

During daylight hours on March 8, 2007, a large 107,849-ton containership, the *MSC Joanna*, owned by a Panamanian corporation and chartered by a Swiss corporation, collided with a 33,423-ton dredge, owned and chartered by Netherlands corporations, in Chinese territorial waters near the port of Tianjin, causing serious damage to both vessels. After Chinese authorities investigated the collision and legal proceedings began, with the arrest of both vessels, in the Tianjin Admiralty Court to resolve liability and damages, the Netherlands corporations commenced eight different actions in

four separate district courts in the United States under Admiralty Rule B to resolve liability and damages issues under U.S. law. The owner and charterer of the containership commenced this limitation-of-liability action under Admiralty Rule F as a defensive strategy to enjoin the eight actions filed against them and then to have this action dismissed in favor of the Chinese proceedings under the doctrine of *forum non conveniens*.

The district court enjoined the U.S. actions and granted the motion to dismiss this action, even though the dredge owner and charterer may now be beyond the deadline for pursuing claims in the Tianjin Admiralty Court. The district court found that "the United States has absolutely no connection to the events giving rise to this action" and the dredge owner and charterer should not be allowed to proceed in U.S. courts. With respect to whether claims might now be barred in the Chinese court, the district court found that the dredge owner and charterer deliberately let the deadlines in the Chinese court pass, and it stated that "[a] party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct" in letting the deadline pass.

Even though the multiplicity of proceedings introduce complexity into this case and equities favor each side, we conclude that the district court did not, in the particular circumstances of this case, abuse its discretion in applying the doctrine of *forum non conveniens* and dismissing this action. Accordingly, we affirm, but with the modification that any applicable statute of limitations or defense

based on a missed deadline may not be affirmatively asserted in the Chinese proceedings.

I

On March 8, 2007, while the world's largest dredge, the *W.D. Fairway* (approximately 770 feet long), was dredging the shipping channel leading through the Bohai Gulf to the port of Tianjin, China, it was hit broadside by a large containership (approximately 1,100 feet long), the *MSC Joanna*, which was departing from the port—*or*, the *W.D. Fairway* crossed the bow of the *MSC Joanna* causing the collision with the containership, depending on whose version of the facts is accepted. Both vessels suffered severe damage, but the hull of the dredge was breached, and the dredge sank to the bottom in shallow water. Both vessels, however, were salvaged and temporarily repaired in Chinese shipyards. The owner and charterer of the dredge now claim that their vessel sustained $326 million in damages, and the owner and charterer of the containership claim that their vessel sustained $10.5 million in damages.

The dredge is owned by Westminster International BV, a Netherlands corporation, and is chartered to Boskalis International BV, a related Netherlands corporation. Both corporations receive services from their common grandparent, Koninklijke Boskalis Westminster NV, a Netherlands corporation. These three corporations (hereafter "Boskalis") are part of the Boskalis group, headquartered in Papendrecht, The Netherlands. Boskalis subchartered the dredge in January 2007 to CCCC Tianjin Dredging Company, Ltd., a Chinese dredging firm, and at the time of the collision, the

dredge was manned by a Chinese crew and was reflagged with the Chinese flag.

The containership, the *MSC Joanna*, is owned by Compania Naviera Joanna SA, a Panamanian corporation, and is chartered to MSC Mediterranean Shipping Company SA, a Swiss corporation and the second largest container-shipping company in the world. The *MSC Joanna*, which frequented ports in the Far East, was manned by a crew of Italian, Croatian, Indonesian, Polish, and "Yugoslav" nationals and was flying the Panamanian flag.

The collision occurred in Chinese territorial waters, which are under the jurisdiction of the Tianjin division of the Maritime Safety Administration, an entity "similar to the United States Coast Guard." The Tianjin Maritime Safety Administration conducted an investigation of the collision, interviewing witnesses, making diagrams, and retaining documents. Shortly after the collision, both the Boskalis entities and MSC Mediterranean Shipping filed petitions with the Tianjin Admiralty Court to obtain evidence-preservation orders, and the court granted the petitions.

About a week after the collision, the Chinese subcharterer of the dredge filed a claim in the Tianjin Admiralty Court for $19.5 million in damages, and in connection with that claim, it obtained an order arresting the *MSC Joanna*. Then on April 4, 2007, MSC Mediterranean Shipping and Compania Naviera Joanna (collectively "MSC Shipping") commenced two actions in the Tianjin Admiralty Court—a limitation-of-liability action and a claim for damages against Boskalis and the

Chinese subcharterer in the amount of $10.5 million. In the limitation-of-liability action, MSC Shipping deposited approximately $20 million with the Tianjin Admiralty Court as the properly calculated limitation fund, and the Court accepted the fund and directed all claimants to file claims for any damages arising out of the collision against the fund by June 30, 2007. The amount of the fund was determined by the tonnage-formula method used by Chinese courts, as well as by the majority of maritime nations (but not by the United States).

MSC Shipping's damages complaint was served on Westminster International and Boskalis International, the owner and charterer of the dredge, and MSC Shipping obtained an order arresting the dredge, the *W.D. Fairway*. Those two Boskalis companies challenged the Chinese court's jurisdiction over them, and thereafter decided to proceed no further in the Tianjin Admiralty Court. As counsel for Boskalis advised the district court in this case:

> All of the Boskalis entities have made the decision that they do not desire to participate in China because they've all—those that have been served have filed objections to the jurisdiction of the Chinese court, which has not been—those objections have not been heard in China at this time.

At oral argument, however, counsel for Boskalis advised us that the Chinese court had rejected their jurisdictional challenge. The record does not reveal whether Boskalis has taken any further steps in the

damages action filed against it by MSC Shipping in China.

Boskalis also made the decision not to file a claim against the limitation fund in the Tianjin Admiralty Court, even though it knew of the Chinese court's admonition that claims had to be filed by June 30, 2007. As counsel for Boskalis acknowledged to the district court:

> The Court: Okay. So the Boskalis entities made a reasoned decision after being notified that there was a limitation of liability proceeding instituted in the courts of China not to participate and let the statute of limitations run?
>
> Counsel for Boskalis: That's correct, Your Honor.

Instead of proceeding in the Tianjin Admiralty Court, Boskalis sought to litigate its claims for damages against MSC Shipping in the United States. It acknowledges that it made this election because U.S. law would, according to its assessment, result in a larger limitation fund than the fund created under Chinese law. On May 4, 2007, it commenced an action against MSC Shipping for $326 million in damages in the Southern District of Texas. Because MSC Shipping was not found in that district, Boskalis proceeded under Admiralty Rule B and attached an unrelated vessel chartered by MSC Shipping, requiring MSC Shipping to file security for

the release of that vessel. Rule B is designed to secure the appearance of the defendant and, through the attachment of defendant's assets, secure satisfaction of any judgment entered, up to the value of the assets. *See Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 693 (1950). Because the amount filed by MSC Shipping to obtain release of its vessel was insufficient to pay Boskalis' $326-million damage claim, Boskalis filed seven additional Rule B claims in district courts in Texas, Louisiana, South Carolina, and Virginia, obtaining a total of 16 orders of attachment under Rule B to be executed against vessels chartered by MSC Shipping.

To avoid the continued attachment of its ships in the United States, MSC Shipping filed this limitation action pursuant to Admiralty Rule F and posted security of $111,348,810, based on the value of the *MSC Joanna* after the collision and pending freight, as required by United States law for calculating limitation liability. *See* 46 U.S.C. § 30505. Although MSC Shipping created a limitation fund, it asserted that its purpose in filing this action was to enjoin the eight actions filed by Boskalis and then to have this limitation action dismissed, contending that no court in the United States was a convenient forum to resolve the issues arising from the collision in China. MSC Shipping stated in its complaint:

> 20. Plaintiffs have initiated this proceeding as the result of Boskalis' filing of eight actions in four different U.S. District Courts seeking sixteen writs of attachment. Plaintiffs

> specifically reserve the right to assert the legal doctrine of *forum non conveniens* in this proceeding, and to file a motion to dismiss this proceeding on those grounds.
>
> 21. Plaintiffs also specifically reserve the right to assert that foreign law applies both to the determination of liabilities arising out of the Collision, and to all issues arising in connection with this limitation proceeding, said applicable law being that of the People's Republic of China.

After the district court enjoined Boskalis from proceeding in the other actions, MSC Shipping filed a motion to dismiss this action in favor of the proceedings in the Tianjin Admiralty Court, based on the doctrine of *forum non conveniens*. The district court granted the motion, even though Boskalis claimed that it could not prosecute its claim in the Tianjin Admiralty Court because it had let pass the time for filing claims there—a question of foreign law on which the parties disagree. The district court recognized that the doctrine of *forum non conveniens* presumes that an adequate alternative forum is available, but it also concluded that Boskalis could not assert the unavailability of an alternative forum when the unavailability was the product of Boskalis' own purposeful conduct. As the court observed:

> The Chinese maritime court established a June 30, 2007, deadline for filing claims in the limitation action. At the hearing, claimants' counsel

> acknowledged that they deliberately chose "not to participate in China." Thus, the only reason the Chinese forum is not available in this case is because claimants knowingly and purposefully opted to miss the deadline for filing their claims in that forum.

(Citations and footnote omitted). The court then addressed the inappropriateness of a United States court adjudicating Boskalis' claims, describing the lack of any nexus between the disputes and the United States. It stated:

> The United States has absolutely no connection to the events giving rise to this action. None of the parties is a United States entity or citizen. Neither vessel was registered in the United States. Neither vessel ever darkened the doorstep of a United States port. No member of either crew was a United States citizen. No United States citizens are fact witnesses. Most, if not all, of the potential witnesses speak a language other than English, requiring a plethora of translators if the case were retained by this court.
>
> * * *
>
> [And] [t]he most compelling public interest factor favoring dismissal may be the challenge of applying foreign law.

The court found that the only connection that Boskalis' claims have with the United States is "incredibly minor," *i.e.*, that "*other* vessels chartered by Mediterranean Shipping Co. regularly call on United States ports."

From the district court's order, dated November 2, 2007, dismissing this action under the doctrine of *forum non conveniens*, Boskalis appealed. On appeal, it contends (1) that the district court improperly allowed MSC Shipping to dismiss its own limitation of liability proceedings on the ground of *forum non conveniens*; (2) that the court erred in dismissing the action without finding that China was an available and adequate forum; and (3) that the court erred because no conditions were imposed "to maintain Boskalis' rights" in the Chinese courts such as having MSC Shipping not assert any limitation defenses in China.

II

Boskalis' principal argument, which is procedural in nature, rests on its assertion that MSC Shipping cannot invoke the benefits of the limitation procedure in Admiralty Rule F and then have its own action dismissed for *forum non conveniens*. As Boskalis summarizes the argument:

> [T]here is no basis for a party to avail itself of the extraordinary benefits of a limitation of liability action in the U.S., and then for that party to seek *forum non conveniens* dismissal of its own action—soon after the deadline for filing claims has passed in its parallel

> limitation action filed in China. The benefits of limitation . . . are only available in return for the owner appearing and agreeing to pay claims up to the amount of the limitation fund. What MSC sought by filing the South Carolina action was not to limit its liability according to the U.S. Limitation of Liability Act, but to avoid liability for this collision, which clearly was its fault, through misapplication of the doctrine of *forum non conveniens*.

MSC Shipping argues that it has a right to bring this limitation action as a defensive mechanism, employing this action as the vehicle for enjoining the United States cases and adjudicating the proper place to litigate the disputes over the collision that took place in China. It contends that Boskalis has advanced no authority to suggest that MSC Shipping used the limitation procedure improperly and that, to the contrary, case law supports its use of the limitation procedure as a "purely necessary defensive action," citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 20 (1972), and *In re Geophysical Service, Inc.*, 590 F. Supp. 1346, 1358-61 (S.D. Tex. 1984).

The procedural issues raised by the parties are indeed complex and novel. But we resolve them by considering all of the proceedings filed to resolve the issues over liability and damages for the collision and by applying to the aggregate proceedings original principles related to limitations of liability, the *forum non conveniens* doctrine, and public policy.

Multiple actions relating to the collision were filed first in China. Following the collision on March 8, 2007, MSC Shipping filed (1) a limitation-of-liability action by which it notified all claimants against the *MSC Joanna* to file their claims against the limitation fund; and (2) a damages action against Boskalis for the damages that the *W.D. Fairway* allegedly caused to the *MSC Joanna*. These actions were commenced in the Tianjin Admiralty Court, which has jurisdiction over both vessels, having arrested both, and jurisdiction over all parties, including the Chinese subcharterer and the Chinese marine pilots of the ships. No party has questioned the capacity of the Tianjin Admiralty Court to adjudicate fairly and completely all of the issues.

In an effort to force MSC Shipping to take advantage of the U.S. Limitation of Liability Act, which in the circumstances of this case would probably result in a more favorable outcome to Boskalis, Boskalis began filing damage claims in the United States against MSC Shipping, demanding in each $326 million in damages. Because MSC Shipping could not be found in the United States, Boskalis employed Admiralty Rule B and attached other, unrelated ships chartered by MSC Shipping that were calling on U.S. ports. It filed eight separate actions in Texas, Louisiana, South Carolina, and Virginia and obtained 16 writs of attachment directed against ships chartered by MSC Shipping. When one of the writs was successfully executed in Texas, MSC Shipping filed a bond to obtain the release of the ship. In response to Boskalis' actions and to avoid further attachments of its ships, MSC Shipping commenced this action to enjoin all of Boskalis' actions in favor of one action

and then to have it dismissed under the doctrine of *forum non conveniens*. In commencing this action, MSC Shipping announced its purpose to challenge in one action all of Boskalis' actions in the United States under the doctrine of *forum non conveniens*, alleging that the appropriate forum for litigating the disputes arising from the collision was in China.

The policy considerations favoring MSC Shipping's strategy center on the policies underlying the doctrine of *forum non conveniens*. MSC Shipping contends that the Chinese courts arrested the *MSC Joanna*, as well as the *W.D. Fairway*, and that a fund of $20 million, computed in accordance with Chinese and international law, is on deposit in the Tianjin Admiralty Court, allowing claims to be made against the fund. It also notes that the liability for the collision will be similarly decided in the damages action it commenced against Boskalis in China, which is also still pending there. In support of its position, MSC Shipping points out that the collision was investigated by Chinese officials, who boarded both vessels, conducted interviews, and collected documentation, and that most of the witnesses would be in China, as the entire crew of the *W.D. Fairway* was Chinese and the marine pilot navigating the *MSC Joanna* through the channel at the time of the collision was Chinese. It notes that neither of the ships has ever called on a U.S. port and neither was manned by even a single U.S. citizen. The owners and charterers of the ships involved are non-U.S. corporations—from Panama, Switzerland, and The Netherlands—and, under conflict of laws rules applicable to the collision, Chinese law will be applicable to resolve the disputes.

Boskalis' principal, if not only, strategic concern with litigating the dispute in China is that the limitation fund created in China is only $20 million, and its claim for damages amounts to $326 million. A limitation fund created in the United States would be much larger—equal to the post-collision value of the vessel and pending freight. *See* 46 U.S.C. § 30505. In this case, the *MSC Joanna* was a large containership that was damaged in the collision to a relatively minor extent, leaving a post-collision value, including pending freight, of more than $111 million. Accordingly, Boskalis is seeking to take advantage of the U.S. limitation-of-liability law, and if it cannot succeed, it is willing to waive participation in the Chinese proceedings, having anticipated that it would receive little or no recovery from them. Put bluntly, Boskalis has gambled on the possibility that the U.S. courts might allow it to proceed in the United States to resolve the claims between it and MSC Shipping and accepted the risk that it will obtain no recovery at all from either a U.S. court or a Chinese court.

The Limitation of Liability Act, 46 U.S.C. § 30501 *et seq.*, has its origins in the maritime law of modern Europe and was adopted by Congress in 1851, having been patterned on its European counterparts. The Act limits a shipowner's and charterer's liability for claims arising from "any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner [or charterer]" to the "value of the vessel and pending freight." 46 U.S.C. § 30505.

Limiting the owner's liability to the value of his interest in the vessel and pending freight was intended to place investors in sea-shipping and navigation on equal footing with corporate investors in land-based enterprises.

> The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises.

Norwich Co. v. Wright, 80 U.S. 104, 121 (1871); *see also Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 399 (1949) (Jackson, J., dissenting) (observing that the Limitation of Liability Act was "designed to encourage American capital to risk itself in shipping ventures where ships are but boards, sailors but men: . . . and then there is the peril of waters, winds, and rocks. In order that disaster at sea might not jeopardize the shipowner's other assets, Congress limited his liability . . . . This limitation serves much the same purpose for maritime ventures that the corporate fiction serves for the landsman's enterprises" (internal quotation marks and footnote omitted)).

Thus, upon receipt of a claim arising from damage at sea or a shipwreck, the owner or charterer of the vessel may commence an action under the Limitation of Liability Act by depositing a fund with the court for the benefit of all claimants equal to the value of the owner's interest in the vessel and pending freight at the end of the voyage or following any wreck. As in an analogous interpleader action or bankruptcy proceeding, the limitation of liability provisions authorize the court to enjoin all prosecutions of claims with respect to the matter other than claims against the fund. Thus, an owner or charterer may avoid a multiplicity of actions against it; resolve the issues raised in the multiplicity of actions in a single action; and limit its liability in the one action to the value of the vessel and pending freight. *See generally* 46 U.S.C. § 30511; Fed. R. Civ. P. Admiralty Rule F.

Complying with the requirements of the Limitation of Liability Act and Admiralty Rule F,

MSC Shipping commenced this action against Boskalis by depositing with the court $111,348,810, the value of the *MSC Joanna* and pending freight. But its purpose in filing this action was not to have claims arising from the collision in China paid from the limitation fund but rather to protect itself from the multiplicity of actions filed by Boskalis against it *in the United States* relating to the collision. Boskalis contends that this use of the limitation-of-liability process amounted to a misuse and that the district court erroneously countenanced it by enjoining Boskalis' U.S. actions in favor of this action and then dismissing this action in favor of the Chinese proceedings under the doctrine of *forum non conveniens*.

In employing Admiralty Rule F in effect to collect all the actions filed in the United States into one action and have that one action serve as the forum for resolving MSC Shipping's *forum non conveniens* challenge to any U.S. litigation, MSC Shipping surely did not fulfill the full purpose of the Limitation of Liability Act, which includes the adjudication of claims against the fund. But it did take advantage of one purpose of the Act, that of enjoining multiple actions in favor of one action to resolve the disputes. Because the threshold question is where trials relating to the collision should take place, it never intended to have the fund used to pay claims. Nonetheless, it did create the fund in the U.S. court as required, and if it loses its *forum non conveniens* challenge, it will be required to litigate the claims in this case. MSC Shipping is thus gambling, just as Boskalis has gambled. But as with any gamble, the bettor must accept the risk of losing.

While there is a certain inconsistency in MSC Shipping's actions when considered within the "four corners" of a limitation-of-liability action, in the larger context, MSC Shipping was simply seeking to collect all of the cases in the United States relating to the Chinese collision and have them subjected to the test for determining whether they should be dismissed under the *forum non conveniens* doctrine. It announced its purpose for doing so at the outset. The alternative would have been for MSC Shipping to follow Boskalis around the country, as it filed each lawsuit seeking to attach assets of MSC Shipping, and, within each action, to make its *forum non conveniens* motion. Judicial efficiency for both parties, however, favors the course selected by MSC Shipping. The superficial inconsistency of filing an action and then seeking its dismissal does not in this context become intolerably inconsistent. The Supreme Court has specifically rejected the argument that the party initiating the limitation proceeding cannot then seek to have it dismissed. *See M/S Bremen*, 407 U.S. at 2, 19-20 (involving a circumstance where the party that initiated a limitations action then sought to dismiss it based on a contractual forum selection clause).

In the peculiar circumstances of this case, we conclude that MSC Shipping did not abuse the U.S. limitation of liability procedure; it complied with its requirements and was prepared to accept its outcome. Moreover, the fact that it filed a motion challenging all U.S. litigation under the *forum non conveniens* doctrine in the limitation of liability action that it filed was not an abuse of the process. If one accepts the conclusion that a foreign corporation's preference for U.S. law in resolving a

dispute arising outside of the United States cannot alone serve as a valid basis for resolving the dispute in the United States, then MSC Shipping's course of proceeding in this case was the most efficient for both parties. Thus, just as the Supreme Court in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 435-36 (2007), deferred to the Guangzhou Admiralty Court in China, we defer to the Tianjin Admiralty Court in China.

Boskalis also contends that while *forum non conveniens* could properly be applied in the actions it filed in the various districts, the doctrine does not apply to limitation-of-liability actions. Although it has rational arguments to make on this point, it fails to account for the case law. In federal courts, the doctrine of *forum non conveniens* appears to have been "given its earliest and most frequent expression in admiralty cases." *American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994); *see also British Transp. Comm'n v. United States*, 354 U.S. 129, 135 (1957) (stating in the context of a claim for limitation of liability that "admiralty limitation [does not preclude] other ordinary admiralty procedures. . . . [The rules] were not intended to restrict parties claiming the benefit of the law, but to aid them" (internal quotation marks omitted)); *Karim v. Finch Shipping Co.*, 265 F.3d 258, 268-71 (5th Cir. 2001) (applying the *forum non conveniens* factors in the context of a limitation-of-liability action); *In re Geophysical Serv.*, 590 F. Supp. at 1361 (dismissing a limitation action on *forum non conveniens* grounds).

In sum, MSC Shipping did not abuse the limitation-of-liability process and the district court did not err in considering a motion to dismiss filed in the limitation-of-liability action on the ground of *forum non conveniens* when the limitation-of-liability action is part of a larger related complex of actions filed in the United States.

III

Still, we are left with the question whether the criteria for applying the *forum non conveniens* doctrine in this case were met. On this issue, we will reverse the district court only when there has been "a clear abuse of discretion." *American Dredging*, 510 U.S. at 455 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). "[W]here the [district] court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Id.* (quoting *Piper Aircraft*, 454 U.S. at 257); *see also Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 314 (4th Cir. 1984).

The *forum non conveniens* doctrine is a common law doctrine now largely limited in federal court to cases where the alternative forum for litigating the dispute is outside of the United States. *See, e.g., Sinochem Int'l*, 549 U.S. at 435-36 (applying the doctrine in favor of the Guangzhou Admiralty Court in China). Under the doctrine, a court may dismiss an action in favor of an alternative forum when "the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or when the chosen forum [is]

inappropriate because of considerations affecting the court's own administration and legal problems." *American Dredging*, 510 U.S. at 447-48 (alteration in original) (quoting *Piper Aircraft*, 454 U.S. at 241) (internal quotation marks omitted).

Granting a motion to dismiss for *forum non conveniens* rests in the discretion of the district court exercised upon consideration of numerous relevant factors, including (1) the ease of access to sources of proof; (2) the availability of compulsory process for securing the attendance of unwilling witnesses; (3) the costs of obtaining the attendance of witnesses; (4) the ability to view premises; (5) the general facility and cost of trying the case in the selected forum; and (6) the public interest, including administrative difficulties, the local interest of having localized controversies decided at home, and the interest of trying cases where the substantive law applies. *See American Dredging*, 510 U.S. at 448 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

Applying these factors, the district court made findings, based on undisputed evidence, that no nexus,—whether the parties, the witnesses, or the law—exists between the United States and the collision at issue. In the words of the district court, "[t]he United States has absolutely no connection to the events giving rise to this action." The prospect of having to interpret and apply Chinese law as it might pertain to liability and the need for the many interpreters for the various involved parties was further given as a reason supporting the district court's conclusion that the public interest weighed overwhelmingly toward dismissal. Accordingly, it

exercised its discretion to dismiss this case under the doctrine of *forum non conveniens*.

In *Piper Aircraft*, the Supreme Court allowed the dismissal of a case, similar to that before us, based on the *forum non conveniens* doctrine. 454 U.S. at 261. The action there arose from an airplane accident in Scotland. The Court held that where "the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States," dismissal is appropriate. 454 U.S. at 242. There the majority of witnesses and complainants, as well as the debris from the accident, were located in Scotland. Even though some of the defendants were Americans, the Supreme Court held that that fact was insufficient to render the district court's dismissal order inappropriate. *Id.* at 260-61.

In this case, the facts weigh even more clearly in favor of dismissal. The collision occurred in Chinese territorial waters and was investigated by Chinese officials. Both ships were arrested in China in furtherance of damage claims filed there. The parties are foreign corporations—from Panama, Switzerland, and The Netherlands—and neither ship had any American national on board. All of the evidence is located in China or some other foreign jurisdiction. And attempting to secure the attendance of witnesses, procure relevant documents and other evidence, and provide translators for virtually every witness able to attend would administratively tax the court system, as would the effort at applying Chinese law.

These facts all weigh in favor of affirming the district court's ruling. Indeed none can be found to weigh in favor of trying this case in the United States. Boskalis can hardly maintain that its wish to apply U.S. limitation law is a sufficient reason to justify trying the case in the United States. *See Piper Aircraft*, 454 U.S. at 254-55. Thus, we conclude that the district court did not abuse its discretion in ordering dismissal of this action.

IV

Boskalis contends that the Tianjin Admiralty Court is not an *available and adequate* alternative forum and that therefore the district court erred as a matter of law in dismissing this action in favor of that forum under the doctrine of *forum non conveniens*. It asserts:

> The district court committed an error of law by dismissing MSC's limitation proceeding in favor of an alternative forum that is neither available nor adequate. First, the court's attempt to create an exception to the availability requirement for fraud or bad faith is entirely without precedent in the doctrine of forum non conveniens. The doctrine of forum non conveniens is well defined, and does not include any such exception.
>
> * * *
>
> Even if such an exception did exist, it would be inapplicable here, as Boskalis

> did not act fraudulently or with bad faith, and the court did not find that it did. MSC commenced two limitations proceedings that were simultaneously open for claims, providing Boskalis with a choice of fora in which to proceed. Boskalis simply chose to proceed in Charleston rather than China. This decision was clearly not a product of fraud or bad faith, and thus should not be subject to the court's ill-founded exception to the availability requirement of forum non conveniens.

It is true that the doctrine of *forum non conveniens* can be applied only where another forum having jurisdiction is available at the time of the district court's decision to resolve the dispute. *See Piper Aircraft*, 454 U.S. at 254 n.22; *Kontoulas*, 745 F.2d at 315. An alternative forum exists "when the defendant is amenable to process in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22 (internal quotation marks omitted). We have held, however, that if the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate. *Kontoulas*, 745 F.2d at 316. But a difference in the law in the two forums—even where the amount of potential recovery is drastically different—is not sufficient to bar application of the *forum non conveniens* doctrine. *See Piper Aircraft*, 454 U.S. at 254-55 (noting that unless plaintiffs would "be deprived of any remedy or treated unfairly," the alternative forum would not be considered inadequate).

In this case, MSC Shipping proffered evidence on the availability of the Chinese forum by noting that the forum had jurisdiction over the parties and over the vessels. With respect to whether a statute of limitations would bar a claim at the time the district court dismissed this action, MSC Shipping argued that Boskalis deliberately forfeited the availability of a forum on this basis by electing not to proceed in China and deliberately letting the time for filing claims in China pass. Boskalis nonetheless argues now that the time for filing had passed and that MSC Shipping cannot fulfill its burden of showing the availability of the Chinese forum.

In addition to showing that Boskalis deliberately forfeited the alternative forum, MSC Shipping also filed affidavits and copies of Chinese statutes to show that the statute of limitations had not in fact expired in China at the time it filed its motion to dismiss. It recognized that the notice issued by the Chinese court required that claims be filed in the limitation of liability action by June 30, 2007, but it provided interpretations issued by the Supreme People's Court of China that have noted that as long as the statute of limitations in a civil case is not raised as a defense, the court will not raise the issue *sua sponte*. Provisions of the Supreme People's Court on Several Issues Concerning the Application of Statutes of Limitation During the Trial of Civil Cases (promulgated by the Supreme People's Court, Aug. 21, 2008, effective Sept. 1, 2008), art. 3. MSC Shipping also showed that Chinese legal scholars have noted that China's system is not a strictly statutory system and that judges are given sufficient leeway to effectuate a just outcome. *See* Feng Jinwei & Zhang Decai, Statute of

Limitations: Law and Realty, China L. & Prac., Dec. 2000-Jan. 2001 (stating that "judge(s) will usually take into consideration the facts of the particular case when deciding whether to strictly enforce the time limits . . . . They do not believe it is fair to decide against the rights holder simply because it has failed to exercise its rights in time" and noting that attempts at settlements or mediation will often be considered sufficient to satisfy the statute of limitations).

While it is thus not clear whether a statute of limitations would have indeed barred Boskalis' claim against the limitation fund in China, the overriding fact in this case remains that Boskalis has *elected not to proceed in China*—presumably based on its assessment that it is unlikely to benefit substantially in doing so—and accordingly has *deliberately* allowed any deadline for filing claims there to pass. As counsel acknowledged candidly to the district court, Boskalis "made a reasoned decision after being notified that there was a limitation of liability proceeding instituted in the courts of China not to participate and let the statute of limitations run." And based on that acknowledgment, the district court found that Boskalis "knowingly and purposefully opted to miss the deadline for filing their claims in [China]" because Boskalis chose "not to participate in China." The district court therefore ruled that "[a] party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct."

We agree with the district court. In circumstances as these, a claimant should not be

heard to complain that an available forum, having jurisdiction over the parties and over most of the witnesses, is not available. Boskalis, relying on its assessment that any recovery under Chinese law would be inadequate, made the considered decision to pass on the Chinese proceedings and try to invoke U.S. law, which it thought would be more favorable to it, yet recognizing that if it were unable to invoke U.S. law, it would be unable to proceed in China. In these circumstances, the district court properly found an exception to the requirement of the *forum non conveniens* doctrine that the alternative forum be available. *See also Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983) (stating that where "the plaintiff's plight is of his own making—for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum—the court would be permitted to disregard this consideration and dismiss"); *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 706 (7th Cir. 2005) (remanding for further exploration the issue whether the actions that made Mexico an unavailable forum were taken in good faith); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 504 (S.D.N.Y. 1985) ("It would be a strange world if a litigant could 'bootstrap' himself into a New York court by missing the statute of limitations in the proper forum").

Boskalis argues that in any event the remedy available in the Tianjin Admiralty Court is inadequate because the limitation fund in China is only $20 million whereas the limitation fund in the United States is $111 million. Because its claim is for $326 million and the Chinese subcharterer has already filed a claim for $19.5 million, Boskalis

claims that the compensation it could expect to receive from proceeding in the Chinese court would be inadequate.

The difference in the size of the limitation funds in China and in the United States results from different methods of computation. The amount of the Chinese limitation fund was determined by the internationally accepted tonnage-formula method by which the offending ship—alleged by Boskalis in this case to be the *MSC Joanna*—is valued by assigning a specific value per ton of the vessel's *pre-voyage* tonnage, irrespective of the damage sustained by the vessel in the collision. Maritime Code of the People's Republic of China (promulgated by Order No. 64 of the President of the People's Republic of China, Nov. 7, 1992, effective July 1, 1993), art. 204-15. This method of computing the limitation fund is the international norm for establishing limitation of liability funds. *See Limitation of Shipowners' Liability—The Brussels Convention of 1957*, 68 Yale L.J. 1676, 1699 (1959) (stating that the tonnage formula is the "mechanism most acceptable to a maximum number of nations"); *see also* Convention on Limitation of Liability for Maritime Claims (LLMC), Nov. 19, 1976, 16 I.L.M. 606; Protocol of 1996, May 3, 1996, 35 I.L.M. 1433. Thus, under the international norm for establishing limitation of liability funds, the value of the fund does not depend on the value of the ship surviving the wreck.

On the other hand, under United States law, the limitation fund is determined by calculating the value of the vessel and pending freight *at the end of the voyage or after the wreck*. Thus, if a ship sinks with only a life preserver salvaged, the limitation

fund would consist of the value of the life preserver. On the other hand, if the ship survives the wreck substantially intact, as did the *MSC Joanna*, the fund would value the entire ship, albeit lessened by the damage value of $10.5 million. *See* Fed. R. Civ. P. Admiralty Rule F(2); *see also* Ruth L. Rickard, Comment, *A New Role for Interest Analysis in Admiralty Limitation of Liability Conflicts*, 21 Tex. Int'l L.J. 495, 498-99 (1986) (explaining the United States' system of post-voyage/wreck valuation).

At bottom, depending on the circumstances, the Chinese valuation method could be more favorable than the United States if the ship had sunk whereas the United States valuation method would be more favorable if the ship were mostly salvaged. Indeed, the United States method has been criticized for this very reason. *See* Rickard, 21 Tex. Int'l L.J. at 499 ("[The United States'] system of post-voyage valuation creates anomalous results. The highest possible fund is created in minor accidents that leave the ship seaworthy . . . . By contrast, the lowest possible fund is created in major disasters, cases that leave a sunken ship and perhaps a few lifeboats").

This difference in the method of calculating the limitation funds indicates, in the circumstances of this case, that the U.S. forum would be more favorable to Boskalis than would be a Chinese forum. Indeed Boskalis argues that because of the Chinese subcharterer's claim, the Chinese priority laws would result in a recovery in China of less than a million dollars. MSC Shipping vigorously disputes this interpretation of Chinese law, arguing that Boskalis might be entitled to a much higher

percentage of the Chinese fund. But we need not, and surely should not, speculate on how Chinese courts might resolve the claims against the limitation fund there. The Supreme Court has made clear that appeals courts are not "to compare the rights, remedies, and procedures available under the law that would be applied in each forum" to determine whether "the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum." *Piper Aircraft*, 454 U.S. at 251. To do so would defeat the intended purpose of the *forum non conveniens* doctrine which "is designed in part to help courts *avoid* conducting complex exercises in comparative law." *Id.* (emphasis added). What we can conclude is that the Chinese forum offers a remedy and process for resolving the dispute—which happens to comport with the international norm for doing so—and thus we should not conduct a "complex exercise[ ] in comparative law" to determine the exact difference Boskalis may be entitled to between the different limitation funds. As the Supreme Court has said, to do otherwise "would increase and further congest already crowded courts" and result in adjudication of cases, "even though none of the parties are American, and even though there is absolutely no nexus between the subject matter of the litigation and the United States," simply because of an unfavorable change in the law. *Id.* at 252, 252 n.17.

"Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." *Id.* at 254. In the circumstances presented in *Piper Aircraft*, the Supreme Court noted that even

though Scottish law did not afford recovery to the plaintiffs based on strict liability, as did U.S. law, and even though the damages might be smaller, these differences did not indicate that a Scottish forum was an inadequate forum. An inadequate forum based on substantive law arises "where the alternative forum does not permit litigation of the subject matter of the dispute." *Id.* at 254 n.22. The Court summarized that a district court may reject an alternative forum as inadequate based on a difference in law *when the claimant "will be deprived of any remedy or treated unfairly."* *Id.* at 255 (emphasis added).

In this case, the Chinese forum provides a remedy, and moreover one that is completely analogous to the remedy provided by a U.S. forum *i.e.* affording the trial of claims made against a limitation fund—albeit computing the limitation fund through a different, but not necessarily less adequate method. If Boskalis were to succeed on its argument that the difference in the method of computing a limitation fund is an appropriate basis for finding inadequacy, it would have to conclude likewise that an admiralty court in The Netherlands, where it is based, and in most other seafaring nations would also not be adequate forums, inasmuch as The Netherlands maritime law, as well as the law of most other seafaring nations, applies the same method of computing the limitation fund as does the Chinese maritime law. *See* LLMC, 16 I.L.M. 606 (The Netherlands as signatory). Also, there is no indication that a Chinese admiralty court would treat Boskalis "unfairly." *See also Sinochem Int'l*, 549 U.S. at 432-36 (applying *forum non conveniens* doctrine in favor of a Chinese admiralty court).

We conclude that the district court did not abuse its substantial discretion in concluding that the District of South Carolina was not an appropriate forum in which to litigate the issues of liability and damages for a collision that occurred in China between ships owned by foreign corporations, particularly in view of its conclusion—which is supported by the record—that "[t]he United States has absolutely no connection to the events giving rise to this action."

We do, however, modify the district court's judgment to make it conditional on MSC Shipping's not raising or asserting a defense based on a statute of limitations or court-imposed deadline in response to any claim made by Boskalis against MSC Shipping in China. *See Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 968 n.6 (2d Cir. 1980) ("[I]t is advisable to make any dismissal conditional in nature").

V

The increasingly integrated markets served by global shipping cry for an increasingly coherent application of maritime law for the resolution of maritime disputes. Just as maritime law grew dramatically during the Middle Ages with the new growth of international trade, to become a reasonably homogenous compilation of principles, so now maritime law demands refinement such that it becomes imbued in application with yet greater mutual respect of seafaring nations for each nation's application of maritime law. More than ever, parties need a system that responds predictably and fairly to maritime disputes arising from international

shipping and trade. Thus, without hesitation, the Supreme Court deferred to the Guangzhou Admiralty Court in China to resolve a dispute over the legitimacy of a bill of lading that led to the arrest in China of a ship that carried steel coils from Philadelphia to China. Likewise, we readily affirm application of the doctrine of *forum non conveniens* in deference to the Tianjin Admiralty Court to resolve the liability and damages for a collision occurring in Chinese waters between ships of foreign nations when the Chinese authorities investigated the collision, the Chinese court arrested both ships involved to aid disposition of the claims made to that court, and no U.S. financial interests are directly implicated.

It will, at the same time, also become increasingly important to the U.S. justice system for district courts to exercise their jurisdiction with care when presented with suits between non-Americans over collisions that occur in foreign waters simply because the application of U.S. law is desired. U.S. courts should be ready to rely on their wide discretion and decline to exercise jurisdiction when doing so will avoid the danger of U.S. courts becoming a place for resolving a maritime dispute only because U.S. law might provide a more favorable outcome for one of the litigants. The circumstances of this case provide a prime example of when a U.S. court should show restraint. We accordingly affirm the judgment of the district court, subject to the condition we imposed in Part IV.

AFFIRMED AS MODIFIED

SHEDD, Circuit Judge, dissenting:

The district court granted MSC Shipping's motion to dismiss this action — an action which MSC Shipping commenced — under the federal common-law doctrine of *forum non conveniens*. After modifying the district court's judgment, the majority affirms. However, it is not clear that MSC Shipping could properly move to dismiss its own action on *forum non conveniens* grounds, but even if it could, the district court erred in granting MSC Shipping's motion because it did so without first concluding that an alternative forum was available at the time of its dismissal, which both Supreme Court and Fourth Circuit case law require. Accordingly, I dissent.

I

Under controlling precedent, a district court must make two findings before it can dismiss an action on *forum non conveniens* grounds. First, it must determine that an alternative forum exists at the time of its dismissal. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Kontoulas v. A.H. Robins Co., Inc.*, 745 F.2d 312, 315-16 (4th Cir. 1984). Second, it must consider various public and private interest factors to determine whether to exercise its discretion and dismiss the action in favor of the alternative forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505-09 (1947); *Kontoulas*, 745 F.2d at 315-16.[1]

[1] For an alternative forum to "exist" within the meaning of the *forum non conveniens* doctrine, a court must find that it is both available and adequate. *Kontoulas*, 745 F.2d at 315-16. Because I conclude that the district court erred by dismissing this action without first determining that an alternative forum is available, I do not reach the question of whether the alternative forum is adequate or whether the district court properly balanced the public and private interest factors.

II

A.

As an initial matter, I am not convinced it was proper for MSC Shipping to move to dismiss its own action on *forum non conveniens* grounds. There is a presumption that the forum chosen by the party that commenced the action is appropriate, and the *forum non conveniens* doctrine provides a mechanism by which the opposing party can overcome this presumption. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007); *Gulf Oil*, 330 U.S. at 505-09. Indeed, courts developed this doctrine in response to the problem of a *plaintiff* choosing an inconvenient forum to "'vex,' 'harass,' or 'oppress' the defendant," *Gulf Oil*, 330 U.S. at 508, and the burdens and presumptions that apply in a *forum non conveniens* analysis are based on the fact that the party who chose the current forum is not the one moving to dismiss the action, *see Sinochem*, 549 U.S. at 430 ("A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum."). Indeed, I am unaware of any controlling authority that establishes a party's right to move to dismiss its own action on *forum non conveniens* grounds.

B.

To the extent the majority's decision to allow MSC Shipping to dismiss its own action on *forum non conveniens* grounds is influenced by its view that the equities in this case favor MSC Shipping, I am not persuaded that this view is correct. For instance, the majority concludes that MSC Shipping's conduct

was consistent with one of the purposes of the U.S. Limitation of Liability Act because, after posting $111,348,810 in security with the district court as required by the Act and applicable rules, MSC Shipping used the Act to obtain an injunction against Boskalis before eventually moving to dismiss the action. *See Maj. Op.*, at 14-15. Simply using the Act to obtain an injunction, however, does not make MSC Shipping's conduct consistent with the Act because MSC Shipping's conduct undercuts the more fundamental purpose of the Act, which is to allow a court to adjudicate claims against the full amount of the security posted. *See, e.g., Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 414 (1954). By moving to dismiss this action, MSC Shipping has effectively used the Act to artificially limit a claimant's available recovery to less than 20 percent of the full fund.[2]

The majority also asserts that MSC Shipping's only alternative to commencing this action was to appear in every Boskalis-initiated attachment proceeding and file motions to dismiss in each of those cases. Yet, MSC Shipping indicated during oral argument that it could have commenced a limitation proceeding in response to and in any *one* of Boskalis's pending attachment actions. Accordingly, MSC Shipping could have used one of those proceedings to obtain an injunction preventing Boskalis from commencing or continuing to litigate its other actions and then moved to dismiss the case in favor of the Chinese forum on *forum non*

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[2] As noted, MSC Shipping posted $111,348,810 in security with the district court, but posted only $20,000,000 (approximately) with the Tianjin Admiralty Court.

conveniens grounds. Not only would this course have served the interests of judicial economy, by preventing the need for the district court's proceedings below, it would have allowed MSC Shipping to move for a *forum non conveniens* dismissal from the traditional posture of the party who did not commence the action.

Furthermore, MSC Shipping only moved to dismiss this action in favor of the Chinese forum after the deadline for filing claims against MSC Shipping in that forum passed; and while the majority states that MSC Shipping asserted in its complaint that it would move to dismiss this action, *see Maj. Op.*, at 7 (citing MSC Shipping Compl. at ¶ 20), the majority overstates the facts. MSC Shipping did not announce in its complaint that it would move to dismiss this action, it only reserved the right to do so. *See* MSC Shipping Compl. at ¶ 20. Therefore, if the equities are at all relevant to determining whether MSC Shipping could move to dismiss its own action on *forum non conveniens* grounds, they do not appear to favor MSC Shipping.

III

A.

Even assuming MSC Shipping could properly move to dismiss its own action on *forum non conveniens* grounds, the district court abused its discretion in granting MSC Shipping's motion because it did so without first concluding that an alternative forum was available at the time of its dismissal. *See United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007) ("A district court abuses its

discretion when it . . . commits an error of law."). As noted above, both Supreme Court and Fourth Circuit precedents require a district court to determine that an alternative forum is available at the time of its decision before it can dismiss an action on *forum non conveniens* grounds. *Piper*, 454 U.S. at 254 n.22; *Kontoulas*, 745 F.2d at 315-16. Controlling case law also makes it clear that the party who moves for a dismissal on *forum non conveniens* grounds bears the "heavy burden of showing" that an alternative forum is available. *Kontoulas*, 745 F.2d at 316; *see also Sinochem*, 549 U.S. at 430 (stating that the defendant bears the "heavy burden"). As the majority acknowledges, an alternative forum is not available if, among other things, the statute of limitations in the alternative forum has expired. *Maj. Op.*, at 20; *see also Kontoulas*, 745 F.2d at 316.

Here, the parties dispute whether a statute of limitations or its equivalent rendered the Chinese forum unavailable at the time of the district court's ruling. According to Boskalis, the deadline for commencing or joining an action against MSC Shipping in China passed on June 30, 2007, which was before the district court's decision. In response, MSC Shipping argues that China does not always follow filing deadlines and therefore *might* permit Boskalis to join or commence an action against it notwithstanding the expiration of the June 30 deadline. *See* Appellees' Br. 26. However, Chinese maritime procedure law and the notices issued by the Tianjin Maritime Court support Boskalis's position. *See* J.A. 105, 326, 333-34. Thus, on this record, MSC Shipping clearly has not carried its heavy burden of showing that the Chinese forum

was available at the time of the district court's decision. Therefore, Supreme Court and Fourth Circuit case law provide that this case cannot be dismissed on *forum non conveniens* grounds. *See Piper*, 454 U.S. at 254 n.22; *see also Kontoulas*, 745 F.2d at 315-16.

However, the majority does not require MSC Shipping to meet its burden. Instead, after noting the parties' differing positions with respect to the availability of the Chinese forum, the majority simply states that it is "not clear whether a statute of limitations would have indeed barred Boskalis' claim against the limitation fund in China." *Maj. Op.*, at 21-22. In other words, the majority finds that it is not clear whether MSC Shipping has carried its burden of showing the availability of the Chinese forum. Nonetheless, the majority affirms the district court's decision by adopting an exception to the *forum non conveniens* doctrine, holding that an alternative forum does not need to be available in this case because Boskalis could have joined the Chinese proceeding before the June 30 deadline expired. I do not agree with the majority that we should adopt and apply such an exception because, as noted above, both Supreme Court and Fourth Circuit case law clearly require that an alternative forum be available before a case can be dismissed on *forum non conveniens* grounds. *See, e.g.*, *Piper*, 454 U.S. at 254 n.22; *see also Kontoulas*, 745 F.2d at 315-16. The majority's decision thus represents a dramatic change from current law.

In addition to being a required element of the *forum non conveniens* analysis, the availability

requirement serves a vital purpose and thus should not be lightly discarded. The Supreme Court has repeatedly instructed that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *see also Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) ("[T]he federal courts have a virtually unflagging obligation to exercise their jurisdiction." (quotation marks omitted)). The *forum non conveniens* doctrine represents one of the narrow exceptions to this general requirement because it allows a court to dismiss an action even if, as here, subject matter jurisdiction is entirely proper. *See Gulf Oil*, 330 U.S. at 504. However, one of the reasons why we can use the *forum non conveniens* doctrine to dismiss an action — even when we have jurisdiction — is because the doctrine's availability requirement helps ensure that a tribunal in some alternative forum will be able to address the merits of the parties' dispute. *See id.* at 504-09; *cf. Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943) (stating that a state court's concurrent jurisdiction counsels in favor of abstention). Indeed, "if no other forum is available . . . it would be exceedingly harsh to dismiss for forum non conveniens." *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 (5th Cir. 1983).

B.

To the extent some courts have created a "bad faith" exception to the availability requirement — under which a party's conduct can eliminate the requirement that an alternative forum be available

— and to the extent there is a suggestion that Boskalis's past conduct places this case within that exception, there is nothing in the record to support such a view. Both United States and Chinese law provided Boskalis with options for attempting to recover losses associated with the collision, and Boskalis simply elected not to pursue a remedy in China. Similar decisions are made by litigants all the time when they decide whether and where to commence an action, and this alone does not show any bad faith by Boskalis.

In any event, the three cases from other circuits that the majority cites in support of its exception to the availability requirement, *see Maj. Op.*, at 22-23, are inapposite. They all involve cases where courts have held or suggested that the past conduct of the party who *commenced* the action can be held against it in determining whether an alternative forum is available.[3] Thus, these three cases do not support considering Boskalis's conduct as a factor in deciding the *forum non conveniens* issue because Boskalis did not commence this action.

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[3] While the *forum non conveniens* doctrine does not support considering Boskalis's conduct when determining the availability of an alternative forum, there is some support for considering the motives of the party that commences the action. As indicated above, courts developed the *forum non conveniens* doctrine as a way of responding to actions commenced by parties whose motives were to "'vex,' 'harass,' or 'oppress' the defendant," *Gulf Oil*, 330 U.S. at 508. Thus, since the doctrine is "sensitive to [a] *plaintiff's* motive for choosing his forum," *Veba-Chemie*, 711 F.2d at 1248 n.10 (emphasis added), there is a basis for considering MSC Shipping's motives because it commenced this action.

It merely responded to a complaint filed by MSC Shipping in a forum of MSC Shipping's choosing.[4]

C.

Additionally, while the majority modifies the district court's judgment to make it conditional on MSC Shipping not "raising or asserting" a defense based on a statute of limitations, *Maj. Op.*, at 26, such a condition is not necessary under the majority's analysis.[5] If, as the majority holds, the alternative forum does not need to be available, then this condition simply serves as a salve to soften the harshness of the majority's new rule.

Moreover, Boskalis can take little comfort in this condition because MSC Shipping itself has stated that "it is not a matter for the parties to waive or extend the deadline for a claimant to file a claim in a Chinese limitation action. Instead, the decision lies within the discretion of the Tianjin Admiralty Court." Appellees' Br. 50 (citation omitted). Consequently, regardless of whether MSC Shipping "raise[s] or assert[s]" the deadline as a defense, Boskalis may be unable to proceed against MSC

[4] Notably, the three cases the majority cites all involve application of the *forum non conveniens* doctrine in the traditional procedural setting — *i.e.*, where the defendant moves to dismiss an action that another party commenced — thus lending support for my position.

[5] In *Kontoulas*, we did not reach the question of whether "conditional dismissals" "were proper under the common law *forum non conveniens* doctrine," and we stated that the moving party in that case "cited no authority for such a conditional dismissal." *Kontoulas*, 745 F.2d at 316 n.10. I am not aware of any controlling authority since *Kontoulas* that authorizes our use of conditional dismissals in this context.

Shipping in China. If anything, the majority should condition the dismissal on the June 30 deadline not preventing Boskalis from commencing or joining an action against MSC Shipping. However, this condition should not be imposed unless MSC Shipping first carries its burden of showing that the alternative forum was available. *See Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 969 n.6 (2d Cir. 1980) ("[E]ven when the district court 'justifiably believes' that there is an adequate alternative forum, it is advisable to make any dismissal conditional in nature when there is uncertainty or conflict between expert opinions with regard to foreign jurisdictional law.").

IV

For the foregoing reasons, I dissent.

[ENTERED: August 3, 2009]

FILED: August 3, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1031
(2:07-cv-01531)

In re: COMPANIA NAVIERA JOANNA SA, as Owner; MSC MEDITERRANEAN SHIPPING COMPANY SA,

Appellees

KONINKLIJKE BOSKALIS WESTMINSTER NV; BOSKALIS INTERNATIONAL BV; WESTMINSTER INTERNATIONAL BV,

Claimants – Appellants

MANDATE

The judgment of this Court, entered 6/26/09, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

[ENTERED: November 1, 2007]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In re Compania Naviera Joanna S.A., as owner and MSC Mediterranean Shipping Company S.A, as bareboat charterer of the M/V MSC JOANNA, for exoneration from or limitation of liability.	)	C/A No. 2:07-CV-001531-DCN **ORDER and OPINION**

On June 1, 2007, Compania Naviera Joanna, S.A. and MSC Mediterranean Shipping Co., S.A. ("petitioners") filed this limitation action pursuant to Supplemental Rule F, seeking exoneration or to limit its liability for claims arising from a collision that occurred between the MSC JOANNA, a container vessel, and the W.D. FAIRWAY, a dredge owned and operated by claimants, in Chinese territorial waters near Tianjin, China. Kininklijke Boskalis Westminster NV, Westminster International BV, and Boskalis International BV ("claimants") have filed a claim for damages of approximately $326 million. This matter is before the court on three motions: (1) petitioners' motion to dismiss on *forum non conveniens* grounds; (2) claimants' motion to transfer venue to the Southern District of Texas; and (3) claimants' motion to lift the restraining order and to stay the limitation proceeding. For the reasons stated below, the court grants petitioners' motion to

dismiss on *forum non conveniens* grounds, concluding that China provides an available, more convenient forum. Claimants' motions to transfer venue and to stay the limitation proceeding are accordingly denied.

I. BACKGROUND

On March 8, 2007, a collision occurred between the MSC JOANNA and the W.D. FAIRWAY. It is undisputed that the collision occurred in the territorial waters of the People's Republic of China, in an area under the jurisdiction of the Tianjin Admiralty Court. The W.D. FAIRWAY, which was the world's largest suction hopper dredge, sustained significant damage.

The MSC JOANNA is owned by Compania Naviera Joanna, S.A., a Panamanian corporation. The MSC JOANNA was and is registered in Panama. MSC Mediterranean Shipping Company, which is organized under the laws of Switzerland, was the bareboat charterer of the MSC JOANNA at the time of the collision and continues to charter the vessel. According to petitioners, the MSC JOANNA operates exclusively between China and Europe, and has never called at a United States port. At the time of the collision, the MSC JOANNA's crew consisted of Italian, Croatian, Indonesian, Polish, and Yugoslavian nationals.

The W.D. FAIRWAY is owned by Westminster of the Netherlands, a Dutch corporation. The W.D. FAIRWAY was and is registered in the Netherlands. The vessel was chartered to Tianjin Dredging Company, a Chinese corporation, although claimants

contend the charter was a prerequisite to dredging in Chinese waters and that the Tianjin Dredging Company was not involved in the vessel's navigation or operation. As with the MSC JOANNA, the W.D. FAIRWAY's crew had no United States citizens. Its crew consisted of Dutch, Lithuanian, Swedish, and Filipino nationals.

Following the collision, a Chinese governmental agency (the Yantai Salvage Bureau) conducted salvage operations on the W.D FAIRWAY in the ports of Tianjin and Qinhuangdao, China. Temporary repairs were made to the MSC JOANNA at the Xingang Shipyard in Tianjin and permanent repairs were made by Samsung Heavy Industries in South Korea. The Maritime Safety Administration, a Chinese agency that petitioners assert is similar to the United States Coast Guard, conducted an investigation into the collision. According to an affidavit submitted by petitioners, the Maritime Safety Administration's investigation included interviews with the crews of both vessels and the harbor pilots, review and retention of vessel records, the taking of photographs, obtaining records on weather and sea conditions, and obtaining records of radar and VHF radio data. Pet. Mem. Supp. Ex. 1 ¶¶5-7.

On March 12, 2007, Westminster NV applied to the Tianjin Admiralty Court for an evidence preservation order, which the court apparently granted. The Tianjin Admiralty Court, upon the application of the Tianjin Dredging Company, arrested the MSC JOANNA on March 16, 2007. Petitioners instituted a limitation action in the Tianjin Admiralty Court on March 29, 2007. That

court established a claims deadline of June 30, 2007. In May 2007, claimants instituted Rule B attachment proceedings against four other MSC-chartered vessels in four different United States district courts, including the District of South Carolina. Petitioners then brought this Rule F limitation action as a defensive measure to prevent further attachments, posted in excess of $110 million in security, and reserved the right to move for dismissal on *forum non conveniens* grounds. Claimants have filed an answer and have claimed damages of approximately $326 million.

II. DISCUSSION

A. *Forum Non Conveniens* in the Limitation Context

As an initial matter, this case's procedural posture does not prevent petitioners from moving to dismiss on *forum non conveniens* grounds. In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Supreme Court considered whether the petitioner in a maritime limitation action could move to enforce a forum-selection clause that selected the United Kingdom as the appropriate forum. The Court concluded that the lower courts erred in refusing to enforce the clause. In doing so, the Court noted that it was unconcerned by the fact that the movant was also the party who filed the limitation action. See id. at 19-20. The Court viewed the limitation action as "purely a defense measure" that did not interfere with the petitioner's ability to move for the enforcement of the forum selection clause. Id. at 19.

The Southern District of Texas reached a similar conclusion when the petitioner in a limitation action sought to dismiss on *forum non conveniens* grounds. See In re Geophysical Serv., Inc., 590 F. Supp. 1346 (S.D. Tex. 1984). The claimants there, like the claimants in this case, argued that a petitioner could not make such a motion after invoking the limitation procedure. See id. at 1354. The court, citing the Supreme Court's decision in Bremen, held that the "[p]etitioners invoked the limitation action as a defensive measure, in response to the many lawsuits filed against them in numerous federal and state courts in Texas." Id. The district court further reasoned:

> Petitioners had no other prudent alternative when faced with Claimants' efforts to litigate the same controversy in numerous courts in Texas. Indeed, certain of the Claimants successfully blocked Petitioners' previous efforts to remove some of the actions filed in Texas state court into federal court, thus precluding consolidation of the suits in one federal court. Lacking any other procedural mechanism to consolidate all the claims arising from this controversy, Petitioners elected to exercise their right to invoke a limitation of liability action in order to consolidate all claims and dispose of them in one action.

Id. at 1355.

In opposing the instant motion, claimants refer to the Fifth Circuit's opinion in Karim v. Finch Shipping Co., 265 F.3d 258 (5th Cir. 2001). The vessel owner in Karim filed a limitation action and then moved to dismiss, arguing there was no personal jurisdiction over the vessel owner in addition to asserting res judicata and *forum non conveniens* grounds. Id. at 262. The district court denied the motions and, on appeal, the Fifth Circuit considered whether the vessel owner could raise a personal jurisdiction defense after it instituted the limitation action. See id. at 262, 265-66. The Fifth Circuit held that the vessel owner could not do so, reasoning that it made little sense to allow a party who voluntarily submitted to a court's jurisdiction to later argue the court had no personal jurisdiction over it. See id. at 265-66. The shipowner argued that the Supreme Court's decision in Bremen supported its position, but the Fifth Circuit distinguished Bremen on two grounds. Id. at 266. First, the court of appeals concluded that Bremen did not hold that a party who initiates a limitation action is not subject to the jurisdiction of the United States court. Id. at 266-67. Second, the question in Bremen was not whether the court had jurisdiction, but whether the court should have exercised that jurisdiction. Id. at 267.

Notably, Karim addressed whether the district court erred in denying the shipowner's motion to dismiss on *forum non conveniens* grounds. See id. at 268. The Fifth Circuit considered such a motion to be appropriate, see id. at 268-69, even noting that "the limitation issue is . . . to be taken as yet another factor to consider in the well-established Gulf Oil/Piper Aircraft framework." Id. at 269.

Although the Fifth Circuit concluded the district court did not abuse its discretion in denying the motion to dismiss, its analysis makes clear that a party who initiates a limitation action may also move to dismiss on the basis of *forum non conveniens*.

B. Application of *Forum Non Conveniens* in this Case

Under the common law doctrine of *forum non conveniens*, a district court will dismiss an action only if transfer to the proper alternative forum cannot be accomplished via 28 U.S.C. § 1404. See Wright and Miller, 14D Federal Practice & Procedure § 3828, at 614-623 (2007). Because a district court can transfer a case to any other district under § 1404, the traditional *forum non conveniens* doctrine applies when the more convenient, alternative forum is in another country. Amer. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994). In summarizing the federal doctrine of *forum non conveniens*, the Supreme Court has stated:

> [W]hen an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish oppressiveness and vexation to the defendant out of all proportion to the plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (internal quotation marks and alterations omitted) (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). Thus, both the private interests of the litigants or the court's difficulties in hearing the case may provide grounds for dismissal on *forum non conveniens* grounds.

Courts traditionally analyze *forum non conveniens* issues using a two-step approach. First, the court must consider whether an alternative forum is available. See Piper, 454 U.S. at 254 n.22; Gulf Oil, 330 U.S. at 506. If the alternative forum is available, the court must apply various factors to determine whether the private litigants' interests and the public interest require dismissal. See Piper, 454 U.S. at 257-61.

1. Whether China is an "Available" Forum

The *forum non conveniens* doctrine necessarily presumes that an adequate alternative forum is available. See Gulf Oil, 330 U.S. at 506. The alternative forum is ordinarily available if the defendant is "'amenable to process' in the other jurisdiction." Piper, 454 U.S. at 254 n.22 (quoting Gulf Oil, 330 U.S. at 506-07). However, circuit courts of appeals, including the Fourth Circuit, have interpreted the availability requirement as precluding dismissal on *forum non conveniens* grounds when the statute of limitations in the alternative forum has expired. See Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 273 F.3d 241, 246 (2d Cir. 2001); Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 426 n.8 (1st Cir.

1991); Kontoulas v. A.H. Robins Co., 745 F.2d 312, 316 (4th Cir. 1984). Claimants assert the Chinese courts are unavailable because the statute of limitations for filing a claim expired in late June 2007.

Although most courts accept the general rule that dismissal is inappropriate if the statute of limitations in the alternative forum has expired, the three courts to address the issue have carved an exception where the statute of limitations expired because of the non-movant's purposeful delay or dilatory behavior. In re Bridgestone/Firestone, Inc., 420 F.3d 702, 703 (7th Cir. 2005), involved a products liability action asserted by a Mexican national against Bridgestone/Firestone, a tire manufacturer, for personal injuries allegedly caused by a defective tire. Id. at 703. The district court dismissed the action on *forum non conveniens* grounds, reasoning that Mexico was an available, adequate, and more convenient forum. See id. The Seventh Circuit approved of the district court's disposition but acknowledged that Mexican courts had apparently refused to hear the case while the appeal was pending, thereby making the Mexican forum unavailable. Id. at 705. The Seventh Circuit noted that it had "serious misgivings about the plaintiffs' actions," particularly because it appeared the plaintiffs filed suit in Mexico in a manner aimed at foreclosing those courts as an available forum. Id. at 706.

Because it did not have an adequate record, the Seventh Circuit remanded. See id. at 706-07. The Seventh Circuit stated that if the plaintiffs "acted in good faith" with respect to its filings in Mexican

courts, then the alternative forum would be unavailable for *non conveniens* purposes and dismissal would not be appropriate. Id. at 707. However, if the district court determined that the plaintiffs "did not act in good faith and manipulated the dismissal of their case in Mexico, the district court should regard itself as free once again to dismiss the complaint." Id. In sum, the Seventh Circuit held that "for purposes of U.S. law a forum may not become unavailable by way of fraud." Id. On remand, the district court held that the plaintiffs had acted in bad faith in obtaining the Mexican court ruling and again held that dismissal was appropriate. See In re Bridgestone/Firestone, Inc., 470 F. Supp. 2d 917, 929 (S.D. Ind. 2006).[1]

The Fifth Circuit addressed the effect dilatory conduct may have on the *forum non conveniens* analysis in Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243 (5th Cir. 1983). The court discussed Gulf Oil's alternative forum requirement, stating that an alternative forum must "be available at the time of dismissal so that [the] plaintiff can pursue his action in what has been determined to be a substantially more convenient forum." Id. at 1248. If an alternative forum is not available, the court reasoned, the Gulf Oil analysis will strongly oppose dismissal. Id. However, as the court stated in a footnote, "Perhaps if the plaintiff's plight is of his own making—for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum—the court would be permitted to disregard

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[1] It appears there was no appeal of the district court's decision on remand.

this consideration and dismiss." Id. at 1248 n.10. The Fifth Circuit specifically noted that the Supreme Court in Gulf Oil was sensitive to a plaintiff's attempts to vex, harass, or oppress the defendant by virtue of his choice of forum. Id. (citing Gilbert, 330 U.S. at 508). If a plaintiff (or other party opposed to *forum non conveniens* dismissal) purposefully foreclosed the availability of an alternative forum, that conduct would certainly be in the realm of vexation, harassment, or oppression.

In Castillo v. Shipping Corp. of India, 606 F. Supp. 497 (S.D.N.Y. 1985), the district court dismissed on *forum non conveniens* grounds because the plaintiff, through his own inaction, lost access to the most convenient forum. The plaintiff in Castillo, like claimants in this case, argued that the court could not dismiss the action on *forum non conveniens* grounds because New York was the only available forum. Id. The court rejected this argument, explaining:

> The plaintiff had a most convenient forum, the Dominican Republic. But, through his own inaction, he lost access to it. He let the Dominican Republic's six-month statute of limitations pass and has lost his remedy there, as well as in India, which presumably would follow the Dominican Republic's statute. It would be a strange world if a litigant could "bootstrap" himself into a New York court by missing the statute of limitations in the proper forum.

Id. at 503-04 (emphasis added). That is exactly what claimants seek to do in this case.

A party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct. The Chinese maritime court established a June 30, 2007, deadline for filing claims in the limitation action. See Pl. Mem. Supp. Mot. Dismiss Ex. 2. At the hearing, claimants' counsel acknowledged that they deliberately chose "not to participate in China."[2] Hrg. Tr. at 32. Thus, the only reason the Chinese forum is not available in this case is because claimants knowingly and purposefully opted to miss the deadline for filing their claims in that forum. The dilatory nature of claimants' actions is particularly apparent because they were on notice long before the Chinese court's deadline passed that petitioners were going to move for dismissal on *forum non conveniens* grounds.[3] See Verified Comp. ¶20. By their conduct, claimants seek to artificially establish this court as the most convenient available forum—an impermissible outcome under the persuasive reasoning of

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[2] At the hearing, the court asked whether claimants "made a reasoned decision after being notified that there was a limitation of liability proceeding instituted in the courts of China not to participate and let the statute of limitations run." Claimants' counsel responded, "That's correct, Your Honor." Hrg. Tr. at 25.

[3] Petitioners filed the verified complaint on June 1, 2007. Claimants answered on June 15, 2007. Thus, claimants had notice that petitioners were going to move for dismissal on *forum non conveniens* grounds at least fifteen days before the Chinese court's deadline for filing claims expired.

Bridgestone/Firestone, Veba-Chemie, and Castillo Shipping.

To be "available," the alternative forum must also offer an adequate remedy, meaning that the remedy cannot be "clearly unsatisfactory." Piper, 454 U.S. at 254 n.22 The Supreme Court has explained that a remedy is clearly unsatisfactory if "the alternative forum does not permit litigation of the subject matter of the dispute." Id. However, the alternative forum is not inadequate simply because that forum will subject the non-movant to an unfavorable change in law or lessen its recovery. See id.; see also Alcoa S.S. Co., Inc. v. M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980) (en banc) ("It is abundantly clear, however, that the prospect of a lesser recovery does not justify refusing to dismiss on the ground of *forum non conveniens*. Moreover, it is not at all unfair for [a party] to recover the lesser amount." (internal citations omitted)). The unfavorable change in law or remedy may be considered in the ultimate analysis, but should only be given substantial weight if the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Piper, 454 U.S. at 254. Claimants assert the remedy offered by the Chinese courts is inadequate for two reasons. First, they claim petitioners' liability under Chinese law is limited to $20 million. Second, claimants contend Chinese law will subordinate their claims to those of third-parties, thereby preventing them from receiving any share of the $20 million limitation fund.

Courts have been reluctant to conclude that dismissal on *forum non conveniens* is inappropriate

where the alternative forum offers some remedy, regardless of how unfavorable the change in the substantive law or the potential amount of recovery. Piper itself involved an unfavorable change in the substantive law because Scotland did not recognize a cause of action for strict liability in tort. See Piper, 454 U.S. at 252. Naturally, a change from strict liability to fault-based liability could have made it significantly harder for the plaintiffs to recover in Scotland, but the Supreme Court still held that dismissal was appropriate. See id.

The Fifth Circuit discussed the adequacy requirement in Gonzlez v. Chrysler Corp., 301 F.3d 377 (5th Cir. 2002). The defendant moved for dismissal, arguing that Mexico was a more convenient forum. Id. at 379. The plaintiff argued, inter alia, that Mexico did not offer an adequate remedy because it had a statutory cap on damages that would have limited his recovery to $2,500 in damages for the death of his three-year-old son. Id. The Fifth Circuit concluded that the Mexican remedy was not "clearly unsatisfactory," even if the economic realities of the case made it unlikely that the plaintiff would ever file suit there. Id. at 381-82. Moreover, the Ninth Circuit has affirmed the dismissal of a suit in favor of a New Zealand forum, even though the plaintiff argued he would recover substantially less for his tort claim because of that country's no-fault accident compensation system. See Lueck v. Sundstrand Corp., 236 F.3d 1137, 1144-45 (9th Cir. 2001).

Dismissing this action will result in an unfavorable change in the law from claimants' perspective; assuming for the purposes of this order

that their potential recovery is limited to only $20 million in China, versus the over $100 million available in this limitation action. Moreover, Chinese law may—at least according to claimants' Chinese law experts—subject claimants to unfavorable priority rules and could subordinate their claims to those of other parties.[4] While that description paints an unrosy picture for claimants, it does not suggest that they are left without a remedy. Moreover, it is difficult to discern a difference between an unfavorable change in priority rules versus a change from strict liability to fault-based liability. Unfavorable priority rules may make it harder for claimants to achieve what they feel is an adequate remedy but does not mean claimants have no remedy at all.[5]

2. Whether China Is a More Convenient Forum

The factors enunciated by the Supreme Court in considering whether dismissal on *forum non*

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[4] This issue of priority is hotly disputed by petitioners' Chinese legal experts. The court has been inundated with dueling affidavits from Chinese lawyers–a harbinger of things to come if this court were to refuse to dismiss this case.

[5] The Supreme Court stated in Piper that the remedy's adequacy should only be given substantial weight if the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Piper, 454 U.S. at 254. Thus, even if the remedy is found to be clearly inadequate, that finding is not dispositive on the *forum non conveniens* issue. Even if the remedy offered in China is "inadequate," the private and public interest factors favor the alternative forum so strongly that dismissal would nonetheless be appropriate.

conveniens grounds fall into two broad categories. The first category of factors, based on the private interests on the litigants, includes: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) possibility of viewing the premises, if viewing would be appropriate to the action; and (4) all other practical problems that make the trial of a case easy, expeditious, and inexpensive. Gulf Oil, 330 U.S. at 508. The second category of factors, based on the public interest in the litigation, includes: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home, (3) the interest of having the trial of a case in a forum that is at home with the law that must govern the action, (4) the avoidance of unnecessary problems in conflicts of laws, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. Piper, 454 U.S. at 241 n.6. A district court undertaking a *forum non conveniens* inquiry must "consider[] all relevant all relevant public and private interest factors." Id. at 257.

Although a plaintiff's choice of forum is typically afforded a "strong presumption" of convenience, the Supreme Court has provided that a foreign plaintiff's choice of a United States forum is entitled to less deference. See id. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice of forum is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry

is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.") A limitation action presents unique issues of which party "chose" the present forum. Because all the parties are foreign entities, and because the Supreme Court has held that this court should apply less deference to a foreign entity's choice of forum, the foreign identity of all parties in this case makes it unnecessary to determine whose "choice" deserves a presumption of convenience; neither party's choice of this forum is entitled to a favorable presumption.

The private interest factors support the conclusion that China is the more convenient forum. The events that are subject to this action occurred exclusively in China. It is thus reasonable to assume that there will be more Chinese witnesses than United States witnesses (if any). Moreover, the relevant evidence is much more likely to be found in China. Indeed, Chinese maritime authorities have already conducted an investigation into the incident; the evidence they gathered is in China, Chinese courts would be able to compel the attendance of witnesses located there, it will be less burdensome for those witnesses to attend proceedings in China. At the time of the collision, the W.D. FAIRWAY was chartered to a Chinese corporation. Chinese shipyards conducted the initial salvage operations on both vessels. To the extent proximity to the location of the collision will assist the finder-of-fact, that factor naturally supports a conclusion that China is more convenient. Although the court acknowledges that a number of witnesses and other evidence is located in countries other than China, as between

the United States and China, the latter has substantially better access to the sources of proof.[6]

The public interest factors also weigh substantially in favor of dismissal. The United States has absolutely no connection to the events giving rise to this action. None of the parties is a United States entity or citizen. Neither vessel was registered in the United States. Neither vessel ever darkened the doorstep of a United States port. No member of either crew was a United States citizen. No United States citizens are fact witnesses. Most, if not all, of the potential witnesses speak a language other than English, requiring a plethora of translators if the case were retained by this court. Any connection this case has with the United States is incredibly minor: other vessels chartered by Mediterranean Shipping Co. regularly call on United States ports. To burden an American court with dueling Chinese legal experts and a series of translators interpreting a polyglot of languages, is above and beyond the scope of the fact finder's duty, especially when the events giving rise to this case occurred on the other side of the globe. At bottom, the United States, its court system, and its citizens have little, if any, interest in the resolution of this dispute.

The most compelling public interest factor favoring dismissal may be the challenge of applying foreign law. Claimants correctly argue that United States law may govern the limitation aspect of this proceeding. Their argument fails to acknowledge,

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[6] The fact that claimants took the first step of applying to the Tianjin Admiralty Court for an evidence preservation order highlights the Chinese forum's access to the relevant evidence.

however, that Chinese law will provide the substantive law of liability. As the Ninth Circuit explained, "The law of liability limitation is different from the law of substantive liability. A law of substantive liability . . . creates or defines a party's liability; a law of liability limitation places an upper limit on a party's liability that has been created by a substantive law." In re Korea Shipping Corp., 919 F.2d 601, 602 n.1 (9th Cir. 1990). Under the Supreme Court's decision in Oceanic Steam Navigation Co. v. Mellor (The Titanic), 233 U.S. 718 (1914), federal courts generally apply United States law as the law of liability limitation. See id. at 733. When a collision occurs in another country's territorial waters, however, that country's law establishes the alleged wrongdoer's substantive liability. See Ishizaki Kisen Co. v. United States, 510 F.2d 875, 879 (9th Cir. 1975); The Gylfe v. The Trujillo, 209 F.2d 386, 387 (5th Cir. 1954). There is no dispute in this case that the collision occurred in the territorial waters of the Peoples' Republic of China. Thus, assuming arguendo that if United States law governs the limits of petitioners' liability, the court tasked with resolving this dispute will have to determine liability according to Chinese law. Although having to apply foreign law is only one of many factors to consider in the *forum non conveniens* analysis, it is particularly relevant where, as here, the United States has no interest in this controversy.

Dismissing this action on *forum non conveniens* grounds is also supported by the recent Supreme Court decision in Sinochem International Co., Ltd. v. Malaysia International Shipping Co., 127 S. Ct. 1184 (2007). Sinochem, a Chinese corporation, purchased steel coils from Triorient, a United States

corporation. Under the sales contract, Triorient would receive payment via a letter of credit by producing a bill of lading demonstrating that the coils had been shipped to China by a certain date. Triorient contracted with Malaysian International, a Maylasian corporation, to transport the coils to China. Alleging that Malaysian International fraudulently backdated the bill of lading, Sinochem instituted an attachment action in China and Malaysian International's vessel was arrested as a result. Malaysian International then brought suit against Sinochem in the Eastern District of Pennsylvania, seeking damages arising from what it considered the wrongful arrest of its vessel in China. Triorient was not a party to any of the actions. Id. at 1189-90.

The Supreme Court primarily considered whether a court may address *forum non conveniens* issues before determining whether it has jurisdiction over an action, eventually concluding that jurisdiction may be assessed either before or after ruling on a motion to dismiss on *forum non conveniens* grounds. See id. at 1192. However, the Court addressed the substance of the *forum non conveniens* question, concluding it was a "textbook case for immediate *forum non conveniens* dismissal." Id. at 1194. The Court briefly elaborated:

> Judicial economy is disserved by continuing litigation in the Eastern District of Pennsylvania given the proceedings long launched in China. And the gravamen of Malaysia International's complaint—misrepresentations to the Guangzhou Admiralty Court in the

> course of securing arrest of the vessel in China—is an issue best left for determination by the Chinese courts.

Id.

Sinochem involved more connections to the United States than the instant case: The events giving rise to the misrepresentations occurred in Pennsylvania (even if the misrepresentations themselves occurred in China) and a United States company was intimately involved in those events. In contrast, the only conclusion to be drawn in this case is that it has no connection to the United States. Even if China is not the most convenient venue among all available fora, it is clear that it has significantly more connections and much more interest in resolving this dispute than does the United States.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that petitioners' motion to dismiss be **GRANTED** and that this action be **DISMISSED**. It is further **ORDERED** that claimants' motions to transfer venue and to lift the stay be **DENIED**.

AND IT IS SO ORDERED.

[/s/ David C. Norton]
DAVID C. NORTON
CHIEF UNITED STATES
DISTRICT JUDGE

November 1, 2007
Charleston, South Carolina

[ENTERED: June 1, 2007]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
IN ADMIRALTY

In the Matter of The Complaint of

COMPANIA NAVIERA JOANNA S.A., as Owner, and MSC MEDITERRANEAN SHIPPING COMPANY S.A., as Bareboat Charterer of the M/V MSC JOANNA, for Exoneration from or Limitation of Liability.

C/A No. 2:07-CV-01531-DCN

ORDER DIRECTING ISSUANCE OF NOTICE AND RESTRAINING PROSECUTION OF CLAIMS

A Verified Complaint having been filed herein on June 1, 2007 by Compania Naviera Joanna SA, as Owner, and MSC Mediterranean Shipping Company SA, as Bareboat Charterer, of the M/V MSC JOANNA, claiming the benefit of limitation of liability as provided by the Revised Statutes of the United States and the various statutes supplementary to and amendatory thereof and/or applicable foreign law, for all losses, damages, injuries and death or destruction allegedly resulting from the collision referred to in the foregoing Complaint which occurred on March 8, 2007, in or near the Port of Tianjin within the territorial waters of the People's Republic of China; and the Plaintiffs

having filed the *Ad Interim* Stipulation and security required by this Court's Order of June 1, 2007;

NOW THEREFORE, on motion of Gordon D. Schreck of Buist Moore Smythe McGee P.A., attorneys for the Plaintiff MSC Mediterranean Shipping Company SA and Douglas M. Muller of Moore & Van Allen PLLC, attorneys for the Plaintiff Compania Naviera Joanna SA;

IT IS ORDERED that a notice issue out of and under the seal of this Court admonishing all persons asserting claims for any and all losses, damages, injuries or destruction allegedly resulting from or incident to the occurrences and happenings recited in the Complaint to file their respective claims with the Clerk of this Court at Charleston, South Carolina, and serve them on Gordon D. Schreck of Buist Moore Smythe McGee P.A., as attorney for the Plaintiff MSC Mediterranean Shipping Company SA, at the address of P.O. Box 999, Charleston, South Carolina 24902, and on Douglas M. Muller, as attorney for the Plaintiff Compania Naviera Joanna S.A., at the address of 40 Calhoun Street, Suite 300, Charleston SC 29401, no later than July 9, 2007, or else be defaulted.

IT IS FURTHER ORDERED THAT PLAINTIFFS are to publish this notice in the Charleston *Post & Courier* once a week for four (4) successive weeks prior to the date fixed for the filing of claims;

AND THE PLAINTIFFS ARE ALSO ORDERED, not later than the day of second publication, to mail a copy of this notice to every

person known to have made any claim against the Vessel or the Plaintiff arising out of the voyage on which the claims sought to be limited arose.

IT IS FURTHER ORDERED that the commencement or further prosecution of any action or proceeding against the Plaintiffs, their underwriters or any of their property with respect to any claims for which the Plaintiffs seek limitation, including any claim arising out of or connected with any loss, damage, injury or destruction resulting from the casualty described in the Complaint, be and the same hereby are stayed and restrained until the hearing and determination of this proceeding.

AND IT IS SO ORDERED.

[/s/ David C. Norton]
David C. Norton
United States District Judge

June 1, 2007
Charleston, South Carolina

[ENTERED: July 24, 2009]

FILED: July 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1031
(2:07-cv-01531)

In re: COMPANIA NAVIERA JOANNA SA, as Owner; MSC MEDITERRANEAN SHIPPING COMPANY SA,

Appellees

KONINKLIJKE BOSKALIS WESTMINSTER NV; BOSKALIS INTERNATIONAL BV; WESTMINSTER INTERNATIONAL BV,

Claimants – Appellants

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Shedd, and Judge Schroeder.

For the Court

/s/ Patricia S. Connor, Clerk

[ENTERED: November 2, 2007]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

In re Compania Naviera Joanna S.A., as owner, and MSC Mediterranean Shipping Company S.A., as bareboat Charterer of the M/V MSC JOANNA, for exoneration from or limitation of liability.

JUDGMENT IN A CIVIL CASE

Case Number: 2:07-CV-1531-DCN

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioners' motion to dismiss be GRANTED and that this action be DISMISSED. It is further ORDERED that claimants' motions to transfer venue and to lift the stay be DENIED.

November 2, 2007

LARRY W. PROPES, Clerk

[/s/ Catina Murray]
(By) DEPUTY CLERK

LEXSTAT 46 USC 30507

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*** CURRENT THROUGH PL 111-69,
APPROVED 10/1/2009 ***

TITLE 46. SHIPPING
SUBTITLE III. MARITIME LIABILITY
CHAPTER 305. EXONERATION AND
LIMITATION OF LIABILITY

Go to the United States Code Service Archive Directory

46 USCS § 30507

§ 30507. Apportionment of losses

If the amounts determined under sections 30505 and 30506 of this *title [46 USCS §§ 30505* and *30506*] are insufficient to pay all claims--

(1) all claimants shall be paid in proportion to their respective losses out of the amount determined under section 30505 of this *title [46 USCS § 30505*]; and

(2) personal injury and death claimants, if any, shall be paid an additional amount in proportion to their respective losses out of the additional amount determined under section 30506(b) of this *title [46 USCS § 30506(b)*].

LEXSTAT 46 USC 30511

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*** CURRENT THROUGH PL 111-69,
APPROVED 10/1/2009 ***

TITLE 46. SHIPPING
SUBTITLE III. MARITIME LIABILITY
CHAPTER 305. EXONERATION AND
LIMITATION OF LIABILITY

**Go to the United States Code Service
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46 USCS § 30511

§ 30511. Action by owner for limitation

(a) In general. The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter [*46 USCS §§ 30501* et seq.]. The action must be brought within 6 months after a claimant gives the owner written notice of a claim.

(b) Creation of fund. When the action is brought, the owner (at the owner's option) shall--

(1) deposit with the court, for the benefit of claimants--

(A) an amount equal to the value of the owner's interest in the vessel and pending freight, or approved security; and

(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter [*46 USCS §§ 30501* et seq.]; or

(2) transfer to a trustee appointed by the court, for the benefit of claimants--

(A) the owner's interest in the vessel and pending freight; and

(B) an amount, or approved security, that the court may fix from time to time as necessary to carry out this chapter [*46 USCS §§ 30501* et seq.].

(c) Cessation of other actions. When an action has been brought under this section and the owner has complied with subsection (b), all claims and proceedings against the owner related to the matter in question shall cease.

[ENTERED: November 30, 2007]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
IN ADMIRALTY

In the Matter of the Complaint of
COMPANIA NAVIERA JOANNA S.A., as Owner,
And MSC MEDITERRANEAN SHIPPING
COMPANY S.A., as Bareboat Charterer
Of the M/V MSC JOANNA, for Exoneration
From or Limitation of Liability.

C/A No.:2:07-CV-01531 DCN

NOTICE OF APPEAL

Notice is hereby given that claimants, Koninklijke Boskalis Westminster NV, Boskalis International BV, and Westminster International BV, hereby appeal to the United States Court of Appeals for the Fourth District, the Order and Opinion entered November 1, 2007 and Judgment entered November 2, 2007 in the captioned action.

Respectfully Submitted,

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